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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~218.~~ 22

OTTO ANDREAE AND BERNHARD ANDREAE, PARTNERS, COMPOSING THE FIRM OF ANDREAE & CO., ET AL., APPELLANTS,

VS.

HEMAN J. REDFIELD.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 15, 1875.

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1 **United States circuit court, northern district of New York. In equity.**

OTTO ANDREAE ET AL.
vs.
HEMAN J. REDFIELD.

The complainants in this cause filed their bill of complaint, which is hereto annexed, on the 11th day of March, 1874, against the defendant herein. A subpœna to appear and answer was thereupon issued, and was served personally, previous to the return day thereof, on the defendant.

On the first day of April, 1874, the said defendant appeared in said cause, by Webster & Craig, as his solicitors, and filed his demurrer to said bill of complaint, which said demurrer is hereto annexed.

On the fifth day of May, 1874, an order for an injunction was filed and entered herein, which is hereto annexed; and on the 14th day of May, 1874, an injunction was issued in pursuance of said order.

2 On the 17th day of June, 1874, an order containing said injunction was filed and entered herein, which is hereto annexed.

At the October term of this court, held at the city hall, in the city of Albany, on the second Tuesday of October, 1874, present, honorable Lewis B. Woodruff, judge, the said cause came on for a hearing, and was submitted upon the pleadings, stipulations, and briefs of the counsel for the respective parties, and decision was reserved.

At an adjourned term of this court, held at the city hall in the city of Utica on the 16th day of March, 1875, an order was filed and entered herein, by which it was ordered, adjudged, and decreed that the defendant's demurrer to the complainants' bill of complaint be sustained, and that the said bill of complaint in this cause be dismissed with costs, which said order is hereto annexed.

3 To the honorable the judges of the circuit court of the United States for the northern district of New York, sitting in equity:

Humbly complaining, show unto your honors your orators:

Otto Andreae and Bernhard Andreae, partners, composing the firm of Andreae & Company; and also the said Bernhard Andreae and Otto Andreae, the younger, partners, composing another firm of Andreae & Company; and also Aaron Arnold, Richard Arnold, James M. Constable, Joseph P. Barker, Clark L. Sharpstein, and Leonard Jacobs, partners, composing the firm of Arnold, Constable & Company; and also Benjamin Babcock and Van Zant M. Moore, partners, composing the firm of Babcock & Moore; and also Frederick Berly; and also Charles E. Borsdorff and Hermann Winter, partners, composing the firm of Borsdorff & Winter; and also Samson Boiceau and Ferdinand Rusch, partners, composing the firm of Boiceau & Rusch; and also William Brunner, Samuel Brunner, and John J. Brunner, partners, composing the firm of William Brunner & Company; and also Lewis Curtis, Benjamin Curtis, and Henry A. Booream, partners, composing the firm of L. & B. Curtis & Company; and also Francis Cottenet and Henry

L. Atherton, partners, composing the firm of F. Cottenet & Company;
and also Francis Cottenet and Henry L. Atherton, partners,
4 composing the firm of Cottenet & Atherton; and also Charles F.
Dambmann and Philip F. Pistor, partners, composing the firm
of C. F. Dambmann & Company; and also Hippolyte DeGoer and Joseph
Rifflard, partners, composing the firm of H. De Goer & Rifflard; and
also Alfred Edwards and Richard Roe, partners, composing the firm of
Alfred Edwards & Company; and also John S Gourd and Henry Gourd,
partners, composing the firm of Gourd Frères; and also Henri Gourd
and John S. Gourd, partners, composing the firm of Gourd Frères; and
also Claudius Gignoux, Tileston Cushing, and Charles H. Christmas,
partners, composing the firm of C. Gignoux & Company; and also Samuel
Guillaume, Amadee Fargis, Anthony Mages, and Sebastian Dupons,
partners, composing the firm of Gillaume, Fargis & Company; and also
Samuel Guillaume, Amadee Farges, and Anthony Mages, partners, composing
the firm of Guillaume, Fargis & Company; and also Chauncey
D. Hurd and John W. Schulten, partners, composing the firm of John
W. Schulten & Hurd; and also Morris L. Hallowell & John Doe, partners,
composing the firm of M. L. Hallowell & Company; and also
Henry Hennequin and Duncan McDagall, partners, composing the firm
of H. Hennequin & Company; and also Louis Heidenheimer, Sigmund
Meyerheimer, and Adolph Mack, partners, composing the firm of L.
Heidenheimer & Company; and also Adrien Iselin, Ernest Giraud, and
Henry J. Barbey, partners, composing the firm of A. Iselin & Company;
and also Adrian Iselin and Ernest Giraud, partners, composing the firm
of A. Iselin & Company; and also David Lane and John Lamson, partners,
composing the firm of Lane & Lamson; and also David Lane,
John Lamson, and Alfred Woodbridge, partners, composing the firm of
Lane, Lamson & Company; and also John Lehmaier and Martin
H. Lehmaeir, partners, composing the firm of Lehmaier Brothers;
and also James S. Little, Paul Alden, and James M. Dunbar, partners,
composing the firm of Little, Alden & Company; and also
William Loeschigk, Otto Wesendonck, and Anthony Schafer,
5 partners, composing the firm of Loeschigk, Wesendonk &
Company; and also William Loeschigk, Otto Wesendonk, and
Gustavus Kutter, partners, composing the firm of Loeschigk, Wesendonk
& Company; and also Willam Loeschigk, Otto Wesendonk,
Gustavus Kutter, and Edward Luckemeyer, partners, composing the
firm of Loeschigk, Wesendonk & Company; and also Henry Lewis,
junior, Joseph W. Lewis, and Walter H. Lewis, partners, composing the
firm of Lewis Brothers; and also Leon Musey and Frederick Goltier,
partners, composing the firm of Musey & Goltier; and also Theodore
Passavant and Herman Passavant, partners, composing the firm of T.
Passavant & Company; and also Charles Payen, L Payen,
and Augustus P. Theriott, partners, composing the firm of C. Payen &
Company; and also Charles Payen and Augustus P. Theriott, partners,
composing the firm of C. Payen & Company; and also Frederick M.
Pyeser; and also Ferdinand Rusch and Adolph Rusch, partners, composing
the firm of F. & A. Rusch; and also Ferdinand Rusch, John G.
Escher, and Adolph Rusch, partners, composing the firm of Rusch, Escher
& Rusch; and also Lewis Rosenfeld, Naftali K. Rosenfeld, and Isaac
Rosenfeld, partners, composing the firm of L. Rosenfeld & Brothers;
and also Frederick A. Spies, George Christ, and Edward Christ, partners,
composing the firm of Spies, Christ & Company; and also Frederick
A. Spies, George Christ, and Louis Jay, partners, composing the
firm of Spies, Christ & Jay; and also Ferdinand Schuchardt, John M.

C. Frohlich, Henry Holthausen, Frederick Schuchardt, and Frederick C.
Gebhardt, partners, composing the firm of Schuchardt, Frohlich &
Holthausen; and also John W. Schulten and Chauncey D. Hard, part-
ners, composing the firm of J. W. Schulten & Hurd; and also J
Steiner, J P. Steiner, and Richard Roe, partners, composing the
firm of J. & J. P. Steiner & Company; and also Adolphus Schniewind
and John Doe, partners, composing the firm of Schniewind & Com-
pany; and also Albert B. Strange and Edward B. Strange,
6 partners, composing the firm of Strange Brothers; and also Ed-
ward B. Strange and Albert B. Strange, partners, composing the
firm of E. B. Strange & Brother; and also Simon Strahlheim and Ar-
nold Friedman, partners, composing the firm of S. Strahlheim & Com-
pany; and also John Syz and Charles W. Funk, partners, composing
the firm of J. Syz & Company; and also Augustus B. Theriott; and
also John A. Ubsdell, Charles Peirson, and George G. Lake, partners,
composing the firm of Ubsdell, Peirson & Lake; and also Charles Vyse,
Thomas A. Vyse, junior, and John Reynaulds, partners, composing the
firm of Vyse & Sons; and also Charles Vyse and Thomas A. Vyse,
junior, partners, composing the firm of Vyse & Sons; and also Robert
Waller; and also Edward Warburg and Julius Goetz, partners, com-
posing the firm of Edward Warburg & Company; and also August
Wetter; and also Oscar Zollikoffer and William Blank, partners, com-
posing the firm of Zollikoffer & Blank. All your orators being mer-
chants of the city of New York.

That your orators severally, by their said firms, being importers of
goods into the port of New York, received divers goods subject to duty,
and the legal duties thereon were in proportion to the actual market-
value of the articles at the principal market of the country from which
they were imported; that Heman J. Redfield, then collector of customs
at said port of New York, the defendant in this suit, added or compelled
the plaintiffs to add to such value certain charges assumed to be for ex-
penses of transportation from such market to the place of shipment,
and also commissions on such value at two and one-half per centum,
and computed the duty upon such increased amount; that the addition
of said charges as expenses of transportation, and also the addition of
commissions above one and a half per cent., that being the usual rate
on importations from Great Britain, and above two per cent., the
7 usual rate on importations from the continent of Europe, (except
Paris,) were erroneous and unlawful under section 1st of the act
of March 3d, 1851, chapter 38; and that said Collector Redfield, never-
theless, made such additions and computed and claimed duty thereon;
and your orators, in order to obtain possession of the goods, paid the
same at different times during the years 1853, 1854, 1855, 1856, and
1857, duly protesting against such excess of duties as provided by law;
that the sums so paid by your orators were of various amounts, being
from $200 to $5,000 to the several importers.

Your orators further show that they duly presented their claims for the refunding of the several sums of money so paid in excess of duties, and so presented them to the refund clerk and the auditor in the custom house at New York, in the defendant Redfield's office, as collector, for adjustment, at divers times after such payments and protests were severally made, and all the claims of your orators were so presented before November 1st, 1859, and within six years after said several sums of excess had been paid, and a large part thereof were so presented before July 1st, 1857.

Your orators further show that suits for the recovery of like excess of duties, in like cases, were brought by other importers in the circuit court of the United States for the southern district of New York, and in the circuit court of the United States for the district of California, wherein it was decided and adjudged that such excess of duties was illegally exacted, and the same were repaid by order of the Secretary of the Treasury.

Your orators further show the Secretary of the Treasury submitted to the rule thus established, and was ready and willing to apply it to the claims of your orators, upon the claims being presented and adjusted in the manner regulated by the Treasury Department, and made and published on or about the 1st day of February, 1856, a general regulation of which an extract from page 22 is hereto annexed, marked "Schedule A," and made a part of this bill.

8 Your orators further show that your orators, by an attorney representing them all, sought for a return of the excess of duties so paid, and the same attorney represented and acted for them all in the proceedings, negotiations, communications, and transactions thereon herein stated; and that the Secretary of the Treasury, on the 4th day of October, 1856, issued an order to said Collector Redfield for the ascertainment of the amount of such excess of duty charged on freight in each case, of which order a copy is hereto annexed, marked "Schedule B," and made a part of this bill; and afterwards, on the 27th day of May, 1857, issued another order to said Collector Redfield for the ascertainment of the amount of such excess of duty charged upon commissions in each case, of which last-mentioned order a copy is hereto annexed, marked "Schedule C," and made a part of this bill; and that the same rules were again laid down by the Secretary of the Treasury by his communication of May 21st, 1863, of which a copy is hereto annexed, marked "Schedule D," and made part of this bill.

Your orators further show that said two orders of October 4th, 1856, and May 27th, 1857, in the practice of the Treasury Department, determined and established your orators' rights to the return of the excess of moneys so paid by them severally for duties; but before repayment would be actually made, it was necessary that your orators furnish statements in detail of the various importations, including the names of the vessels by which such importations were made, and the dates of arrival, to the auditor in the New York custom-house, to enable the auditor or refund clerk in his office to prepare the certified statements pursuant to the said instructions of the Secretary of the Treasury, which proceedings required great labor, care, and attention, and necessarily demanded a considerable period of time for their completion;
that your orators, by their said attorney, diligently attended to so
9 much of the business as was to be done on their part, and before
November 1st, 1859, all the bills of particulars of the claims of your orators were fully presented in each case before said auditor in the custom-house for adjustment.

Your orators further show that the usual certified statements for return of duties on your orators' said claims were not promptly completed by the auditor and refund clerk; that said Collector Redfield was succeeded in the office of collector of customs at New York July 1st, 1857, by Augustus Schell; and afterwards said Collector Schell refused to allow the process of adjustment of said claims to be continued, and complaint thereof was made by your orators, through their said attorney, to the Secretary of the Treasury, and he afterwards, on the 21st day of May, 1858, issued to said Collector Schell an order, of which a copy is hereto annexed, marked "Schedule E," and made a part of this bill.

Your orators further show that said Collector Schell continued to neglect and hinder the said adjustment, and the claims of your orators were not reported on in pursuance of said orders of the Secretary of the Treasury; and that while said adjustment proceedings were in progress and were so suspended by Collector Schell, at some time in the summer of the year 1859, the plaintiffs, by their attorney, suggested to Samuel G. Ogden, the auditor, that the statute of limitations would apply to said claims, and the period of limitations of six years from the accruing of the cause of the action in some of the cases would expire on the first day of November, 1859, and in the residue of the cases on divers days before July, 1863, and he supposed it might be necessary to commence suits before November 1st, 1859, on all the claims, to prevent that statute from becoming a bar.

In reply to which M'r Ogden, the auditor, informed the said attorney that the Department having given instructions to refund the money in
those cases, it was not the fault of the Department that it was not
10 refunded; that the instructions of the Secretary to the collector
in May, 1858, were peremptory, and all the plaintiffs had to do to prevent the statute of limitations from running was to present their claims in each case to the refunding clerk in the auditor's office for adjustment, upon which presentation, by the rules and practice of the Treasury Department, the statute ceased to run.

M'r Ogden, the auditor, then further stated to the said attorney that if all the plaintiffs should commence their suits for the recovery of these debts which the Secretary has already ordered to be refunded, it would justify the Department in the belief that it was done for the purpose of accumulating bills of costs, and must necessarily annoy the Department and unfavorably prejudice the Department against the plaintiffs and their claims, and that it was not necessary to commence suits to prevent the statute from running, but only to present the claims; that the Department was willing to refand, beit its agent, Collector Schell, was temporarily disregarding its instructions, but must ultimately obey them, and all would be right.

Your orators further show unto your honors that afterwards, in or about September, 1859, the said attorney conversed with the defendant Redfield on the subject of Collector Schell's refusing or neglecting to adjust the cases pursuant to instructions, and referred to the question of the statute of limitations, and stated to the defendant what the auditor, M'r Ogden, had said on the subject.

The defendant thereupon replied that he no longer had any control over the adjustment of these claims, and, as far as he was concerned, Auditor Ogden had the whole charge of the matter, who must be, from his long experience, familiar with the practice of the Department, and the attorney could rely upon the accuracy of M'r Ogden's statements; and shortly thereafter, at a meeting of the said attorney and said Ogden and said Redfield, said Ogden stated to said Redfield, as he had before
to the attorney, that according to the practice of the Departmment,
11 if the plaintiffs had already presented their claims for refunding,
or if they would do so, the statute ceased to run from the date of such presentation as effectually as if suit was commenced; and he corroborated his assertions by referring the defendant to decisions of the Department to that effect, and at the same time expressed his belief that Collector Schell would yet be persuaded to resume the adjustment; and the defendant thereupon said he saw no necessity for suing on those cases,

and if the plaintiffs had presented or would present their claims for adjustment, the statute ceased to run from that time, and could not and would not be interposed as a defense to the payment of them, and he concurred with Mr Ogden in the expressed opinion that Collector Schell would soon resume the adjustment of them, and added that of course these claims would all be paid.

Your orators further show unto your honors that, relying upon the matters aforesaid, and for the purpose of avoiding a multiplicity of suits, the plaintiffs refrained from bringing action immediately, in full faith and confidence that the statute of limitations would not be set up as a defense, in case suits should be brought on said claims at any times afterwards.

Your orators farther show that afterwards, and in the latter part of the year 1859, the said attorney made known to the Secretary of the Treasury the situation of the plaintiffs' claims, and the representations of Auditor Ogden and Collector Redfield in respect to the statute of limitations, and enquired of the Secretary of the Treasury whether the plaintiffs could rely upon the representations and statements that suits need not be commenced to prevent the statute from running, provided they presented their claims for adjustment in proper time; and the Secretary of the Treasury, upon consultation with the clerk at the head of the customs bureau in his Department, replied to said attorney that such had been the practice for many years, and that latterly the Department, 12 with the view of discouraging the multiplicity of suits, had become even more liberal in its practice, and referred to the case of Sawyer against the collector of Boston, as shown by the letters of May 18th, 20th, and 27th, 1858, copies of which are annexed hereto, marked Schedules F, G, and H, and made a part of this bill; and the Secretary then said to the attorney that under this latter ruling of the Department the statute had already ceased to run against these claims, and the plaintiffs' attorney could assure his clients that it was wholly unnecessary to commence suits, the Department having acquiesced in the decision of the courts and given instructions to refund, and he trusted Collector Schell would soon find time to carry these instructions into effect.

Your orators further show unto your honors that the plaintiffs relied on the aforesaid representations and promises, and refrained from bringing their actions for a long time thereafter.

Your honors further show unto your honors that during the period from 1859 to May, 1864, a great number of like claims in like manner presented, and in all respects similar in their nature to the plaintiffs' claims, were adjusted and the moneys were paid to the parties, the same being claims of persons other than the plaintiffs in this suit; and on the 10th day of May, 1864, there remained unadjusted and unpaid the claims of the several plaintiffs in this suit, being sixty claims in number, and none of the same have been paid, except partial payments in some cases.

Your orators further show that it was the practice in many cases of claims for return of excess of duties paid to bring actions against the collector who received the same, and have them referred by the court to its clerk to be examined into, and the amount of excess ascertained, upon which the same was refunded by the order of the Treasury Department, and about that time it became known that the Secretary of the Treasury preferred to have such claims so adjusted by judicial 13 proceedings in preference to the adjustment thereof in the office of the auditor; and on learning the same, and by reason as well thereof as of the continued delays in the adjustment of said cases, your orators, by their said attorney, brought their several actions at law, sixty in number, against said Redfield, in the supreme court in the city of New York, and had the summonses therein served on him at his then residence in Batavia, in this State; that the time for said Redfield to appear and answer in said actions expired, without any appearance or defense on his part, and your orators had become entitled to judgment by default, when said Redfield caused said sixty actions to be removed by certiorari into the circuit court of the United States for the northern district of New York, wherein said Redfield was served with process.

Your orators further show that, on said actions being so removed, your orators declared in the same, in assumpsit, on the common money-counts and insimul computassent count, for the moneys so paid in excess of duties; and the defendant, Redfield, after many delays in requiring long bills of particulars and other extensions, pleaded to each of said actions non assumpsit, payment, and the statute of limitations of six years.

Your orators further show that, on the 20th day of May, 1858, the collector of the port of Boston sent to the Secretary of the Treasury a communication, of which a copy is hereto annexed, marked "Schedule G," and made a part of this bill, and that the Secretary of the Treasury sent his reply thereto on the 27th day of May, 1858, of which a copy is hereto annexed, marked "Schedule H," and made a part of this bill; and afterwards, on the 30th day of March, 1864, the United States district attorney for the southern district of New York sent to Hiram Barney, then collector of New York, a communication, whereof a copy is hereto annexed, marked "Schedule I," and made a part of this bill; and that the said district attorney thereafter declined to plead the statute of limitations in such cases.

14 Your orators further show that Edward Jordan, Solicitor of the Treasury, by his report to the Secretary of the Treasury made August 14th, 1866, in respect of defenses under the statute of limitations, said as follows:

"In my judgment, the statute of limitations should not be pleaded or employed to defeat a claim as to the validity of which, on other grounds, there is no doubt. I think that a resort to the statute in such cases would be as dishonest and disreputable on the part of the Government as it is considered to be on the part of a private person. There are, besides, special reasons why the statute should not be employed against many of the claims now under consideration."

Your orators further show that upon your orators', through their said attorney, afterwards asking M'r Jordan what the special reasons were to which he referred in the passage above given, M'r Jordan replied by letter, and therein said:

"In reply to your enquiry, I have to say that I do perfectly remember what were the special reasons to which I then referred. They grew out of the fact, which appeared in the papers then in my possession, that the holders of many of those claims had received assurances on behalf of the Government, on which they had relied, and on which I thought they had a right to rely, that there was no occasion for the prosecution of suits for the recovery of their demands, since the principles on which they depended had been settled by the courts and acquesced in by the Treasury Department, that they would be paid as fast as they could be adjusted, and that there was no ground for apprehending that the statute of limitations would be interposed to defeat them.

"I will add that I should most certainly have stated these considerations in full had I supposed that there was any danger that the Government should be placed in the attitude of committing an act which is considered disgraceful by all who regard the performance of undisputed obligations as a duty."

15 Your orators further show that the counsel defending said actions against your orators is employed by the Treasury Department, and at the expense thereof.

And your orators further show unto your honors that said pleas of the statute of limitations having been so put in, your orators requested that the same might be withdrawn; but said Redfield, by his attorneys in said suits, refused to withdraw the same; and that your orators, upon the advice of counsel, thought that said pleas of limitation could be effectually answered and defeated at law by reason of the matters aforesaid, and therefore obtained leave of said circuit court for the northern district of New York to put in several replications to said pleas in each of said actions, and thereupon did put in several replications to the plea of the statute of limitations, of which plea and replications copies are hereto annexed, marked "Schedule K," and made a part of this bill; that unto said replications the defendant interposed a demurrer, of which a copy is hereto annexed, marked "Schedule L," and made part of this bill.

And your orators further show unto your honors that said demurrer was brought on to be heard in the circuit court of the United States for the northern district of New York, before the Hon. Lewis B. Woodruff, circuit judge, who heard the argument thereon, and afterwards, in the latter part of March, 1872, gave judgment on the demurrer, by which he sustained the first and second replications, and held the third and fourth replications insufficient, and delivered his opinion, in which he declared and held, as to said first replication, as follows:

"As to the first of these replications, I should have had great doubts whether it was an answer at law to the pleas of the statute of limitations but for the case of Gaylord vs. Van Loan, (15 Wendell, 308,) and the cases therein referred to. Such an agreement, if to be enforced as an agreement, would seem to me to furnish occasion for an appli-
16 cation to a court of equity to restrain the defendant from pleading
his legal defense where, by reason of the agreement, and what was done under it, it was inequitable to plead the statute. How it is, as an agreement, a legal answer to the plea is not obvious. The theory of an estoppel in pais makes the circumstances creating the estoppel conclusive evidence of the facts imported thereby, and as evidence of such fact it is useful. It is doubtless grossly inequitable for a defendant to plead the statute of limitations when, for a sufficient consideration, he has agreed with the plaintiff that he will not, or to plead usury when, upon like consideration, he has agreed with the plaintiff that he will not, or to set up any defense when, upon like consideration, he has agreed that he will not defend. But a replication to a plea setting up that the defendant, for a consideration, would not interpose any plea to the action would be a novelty at least. A court of equity can deal much better with agreements of this description, and can examine all the circumstances attending the making of the agreement and its performance, consider all the resulting equities, and grant or withhold an injunction or not, as may be just. I, however, yield this doubt to the cases cited, especially since the defendant's counsel does not, in his argument, deny the sufficiency of the replication on any other ground."

Your oraters further show that the defendant afterwards took an issue of fact on the first and second replications, and the actions now stand on issues of fact, with a judgment on demurrer against the plaintiffs on the third and fourth replications, and are liable to come to trial thereon at the next term of the circuit court of the United States for the northern district of New York, to wit, on the third Tuesday of March next.

Your orators further show that they have good and substantial 17 causes of action in said several sixty suits for the recovery of money due upon claims recognized by the Treasury Department to be just and legal, and they are exposed to be defeated at common law upon the trial of said suits by reason of the said pleas of the statute of limitations, which have been wrongfully put in, unless relieved by this court by the interposition of its equity powers in restraint of the defendant on such pleas of the statute of limitations.

Your orators further show that, as your orators believe, and therefore charge, the several representations, agreements, and assurances so given as aforesaid by the Secretary of the Treasury and by the auditor, were and are binding in equity upon the defendant; and that the putting in of said pleas of limitations and attempting to defend on that ground are inequitable in the defendant and in violation of your orators' rights, as well by reason of said representations, agreements, and assurances so made by the Secretary of the Treasury and the Auditor as of those made by the defendant himself.

Your orators further show that your orators have acted together in all the proceedings aforesaid, and by the same attorney, and said Redfield, defendant, in all said sixty actions, by the same counsel, and all the notices, orders, consents, or other ordinary proceedings in said sixty suits, including the replications, and demurrers, and printed briefs on the hearing, have been joint, bearing the titles of all the suits written together, or bearing the title of one of them, with the addition of "fifty-nine other suits against the same defendant," or words to that effect, and that the order made by the court, on the decision of said demurrers, was a single order entitled in all the said sixty actions, and the rejoinder allowed thereby, and put in by the defendant, was a single paper entitled in all said actions, and all statements, agreements, and admissions in relation to the statute of limitations, so made and given by the Secretary of the Treasury, the Auditor, and the defendant, were so made and given to your orators jointly, and your orators have a common 18 and joint interest and claim to establish and maintain the same, and, so far as relates to the same, the defendant's interest and liability is joint and common towards all your orators; and your orators are *de*vised and believe that in seeking the equity relief prayed for in this case they properly unite in this bill, rather than file sixty several bills for the same relief; and that said Redfield is about to proceed to the trial of said sixty actions at law, and to set up and insist on the defense of the statute of limitations, in violation of the representations, assurances, statements, and agreements aforesaid; all of which actings, doings, and pretences of the said defendant are contrary to equity and good conscience, and tend to the wrong, injury, and oppression of your orators in the premises.

In consideration whereof, and forasmuch as your orators are entirely remediless in the premises according to the strict rules of the common law, and can only have relief in a court of equity, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the said Heman J. Redfield, defendant, may, without oath, (his answer on oath being hereby waived,) full, true, direct, and perfect answer make to all and singular the matters herein stated and charged, as fully and particularly as if the same were hereinafter repeated and he thereunto distinctly interrogated, and that he may show, if he can, why your

orators should not have the relief hereby prayed, and that it may be deemed in this suit that your orators are entitled in equity to be protected against said plea of the statute of limitations, and that it may be decreed that the defendant, Heman J. Redfield, is bound in equity as having stipulated and agreed not to plead the statute of limitations, and that the defendant may be required to execute a stipulation or agreement in writing waiving all defense and right of defense under the statute of limitations in all said litigations, and that he may be required to retract and withdraw his said pleas of the statute of limitations
19 in all said cases; and that the defendant, Heman J. Redfield, may be enjoined and restrained, pending this action and forever afterwards, from presenting or maintaining upon the trial of any of said sixty suits of his plea of the statute of limitations, and from claiming or insisting on said trials upon any defense thereunder, and from in any way or manner claiming or pretending in said sixty actions or any of them that the statute of limitations is a bar thereto, or that your orators may have such further or other relief as the court may see fit to grant, may it please your honors not only to grant unto your orators not only writs of injunction, issuing out of and under the seal of this honorable court, to be directed to the said Heman J. Redfield and his agents, attorneys, solicitors, and counsellors, restraining him and them as hereinbefore prayed, but also a writ of subpœna directed to the said Heman J. Redfield, commanding him, on a certain day, and under a certain pain, therein to be limited, personally to be and appear before your honors in this honorable court, and then and there full, true, and perfect answer make to all and singular the premises, and further to stand to, perform, and abide such further order, direction, and decree as to your honors shall seem meet.

And your orators will ever pray, &c.

ALMON W. GRISWOLD,
Solicitor and of Counsel for Plaintiffs.

CHARLES TRACY,
Of Counsel.
CORNELIUS A. RUNKLE,
Of Counsel.

20 A.

Freight or transportation from the foreign port of shipment to the port of importation is not a dutiable charge. In cases, therefore, of goods arriving in the United States after having been first transported from the place of their production or manufacture to another port or place, whether in the same or another country, by land or by water, and thence transhipped for the United States—provided satisfactory evidence be adduced to the collector of the customs at the port where the said goods shall arrive that they were originally shipped with the bona fide intention of having them transported to a port in the United States as their final port of destination—no dutiable costs or charges will have accrued either on the transportation from the first to the intermediate port, or while remaining in or leaving the latter, the voyage or transportation being regarded as continuous from the country whence originally exported in good faith, on a declared destination for a port and parties in the United States. In illustration of the rule thus established it may be remarked that the evidence of final destination being satisfactory, no duties would be chargeable in ports of the United States on the freight, or transportation, or charges in the intermediate ports, on goods originally from China, or Glasgow, or Cardiff, or Londonderry to Liverpool; from Malaga to Valparaiso; from Dresden to Bremen; or from Basle to Havre, on the said goods being transhipped for the United States from the several intermediate ports enumerated.

B.

TREASURY DEPARTMENT,
October 4th, 1856.

21 SIR: On application being made to you by Mess'rs A. Iselin & Co. and others, of New York, you are authorized and directed to cause to be prepared the usual certified statements for return of "duty on freight," in such cases where the same has been found to have been paid in excess, as decided by this Department in General Regulations No. 63, page 22, and under written protest, and transmit same to this Department for its consideration.

Very respectfully, your obedient servant,

JAMES GUTHRIE,
Sec. of Treasury.

H. J. REDFIELD, Esq.,
Collector of Customs, New York.

C.

TREASURY DEPARTMENT,
May 27th, 1857.

SIR: I am in receipt of your letter of the 26th inst., transmitting a report of the U. S. appraisers in relation to the "usual commissions" charged in China, Sweden, Norway, Holland, and German ports, and have to state, in reply, that you will cause to be prepared and transmitted to this Department the usual certified statements for a return of the duty exacted in error in all cases where it is found that the said duty has been on a rate of commission greater than the usual rate chargeable in the above-named countries.

Very respectfully,

HOWELL COBB,
Sec. of Treasury.

H. J. REDFIELD.
Collector of Customs, New York.

22 D.

Additional instructions.

TREASURY DEPARTMENT,
May 21st, 1863.

Collectors and others are informed that this Department concurs in the decisions of the courts that charges for transportation of goods from the interior of the country by railroad or water carriage, incurred prior to the time of exportation, cannot be added to the value of the goods for the purpose of establishing their dutiable value.

All costs and charges incidental to the shipment, such as port charges, drayage, commissions, export duty, etc., etc., except marine insurance, should be added to the value of any goods, wares, or merchandise in the principal markets to fix their dutiable value.

The usual or legal rate of commissions on merchandise from Great Britain has been decided in the U. S. circuit court at New York (Bredt et al. vs. Schell, coll'r) to be $1\frac{1}{2}$ per centum, and that of commissions on merchandise from continental Europe, except Paris, (see same case,) to be 2 per centum. In this decision the Department also concurs.

S. P. CHASE,
Sec'y of Treasury.

E.

TREASURY DEPARTMENT,
May 21st, 1858.

SIR: I would call your attention to the instructions of this Department, dated October 4th, 1856, wherein authority is given to prepare and transmit the usual certified statements for return of duty on "sea-freight," paid under written protest. As the parties who represent sev-
eral of the claims have made complaint of the delay attending
23 the preparing of the same in your office, you are requested to have
the above instructions complied with at your earliest convenience.

I am, respectfully,

HOWELL COBB,
Sec'y of Treasury.

AUGUSTUS SCHELL,
Coll. New York.

F.

TREASURY DEPARTMENT,
May 18th, 1858.

SIR: In the certified statements of claims of J. Sawyer, S. A. Way, and S. L. Wiggins & Co., for return of excess paid on storage, it would appear, from a portion of the dates of importation, that they are debarred by the statute of limitation of your State.

The Department, therefore, before taking any action upon them, will require further information as to the fact, and also the various dates when the payments of the storage were made.

I am, respectfully,

HOWELL COBB,
Secretary of the Treasury.

A. W. AUSTIN, Esq.,
Collector, Boston.

G.

CUSTOM-HOUSE, BOSTON,
Collector's Office, May 20th, 1858.

SIR: I am in receipt of your letter of the 18th inst., requesting information in respect to the claims of James Sawyer, Sam'l A. Way, and J. L. Wiggins, for storage exacted in excess, portions of which, from the dates of importations given, appear to be barred by the statute of limitation of this State.

24 By the Revised Statutes of Massachusetts, chap. 120, sec. 1, "all actions of assumpsit, or upon the case, founded on any contract or liability, express or implied, are required to be commenced within six years next after the cause of action shall accrue, and not afterwards."

The action of Foster et al. vs. Peaslee, on the judgment in which this class of claims is allowed, was commenced in the May term of the circuit court, 1856. The law was argued at the October term, and decided by the court against the collector. At the May term, 1857, judgment was entered, and the decision acquiesced in by the Department under date of June 16th, 1857.

It has been the practice in claims of this description, where a single case was tried to determine the law, to extend to all the claimants under the decision the advantages in respect to limitation acquired by the party bringing the suit, provided their claims were equally valid in other particulars.

Thus, in the cases in question, I deemed it proper to include in the statements all claims which accrued within a period of six years prior to May, 1856, when the action of Foster was commenced. This rule was adopted to prevent a multiplicy of suits for the same cause, which would otherwise be likely to be brought, and so to save expense to the United States.

Under this rule none of the items embraced in the statements referred to in your letter are barred. Assuming, however, that claims which accrued six years or more prior to June 16th, 1857, the date of the Department's acquiescence in the decision of the court, are cut off by this statute, then the item of $3 in the statement in favor of J. Sawyer is not allowable, the same having been paid on the 3d of April, 1851. In the other cases, an examination of the dates of payments, as appearing on the records of this office, shows that the several claims were
25 made within the time limited by law. A memorandum of those dates, in all instances involving doubt, is enclosed.

Very respectfully, your obd't serv't,

ARTHUR W. AUSTIN,
Collector.

HON. HOWELL COBB,
Sec'y of the Treasury, Washington.

II.

TREASURY DEPARTMENT,
May 27th, 1858.

SIR: Your report relative to the claims of James Sawyer and others for return of excess paid on storage is received, and the Department having concurred therein, you are informed that all cases of a similar nature must only include statements * * * subsequent to May, 1850.

I am, respectfully,

HOWELL COBB,
Secretary of the Treasury.

A. W. AUSTIN, Esq.,
Collector, Boston.

I.

(OFFICIAL HEADING,)
March 30th, 1864.

HIRAM BARNEY, Esq.,
Collector of the Port:

26 SIR: Your communication of the seventeenth instant in relation to the cases of Opdyke et al. vs. Redfield, and The Same vs. Schell, has been received, and in reply I beg to state that it was understood at the time these verdicts were taken that they came under the

decision of the court in the cases of Masset vs. Maxwell, Winslow et al. vs. The Same, and Raymond et al. vs. The Same, in each of *each of* which a motion was made on behalf of the Government to set aside the verdicts for the purpose of allowing the plea of the statute of limitations to be interposed.

Upon the hearing of that motion the plaintiffs put in evidence authenticated copies of a correspondence between the Secretary of the Treasury and collector of the port of Boston, a copy of which is herewith enclosed, and to which I invite your attention, because in the effort on the motion above referred to to explain away and avoid the rule which by this correspondence the Department had promulgated, the court very pertinently asked "if it was pretended that the Treasury Department had one rule for Boston and a different one for New York." The motion was denied. If, as you suggest, I should move to open the judgments and set aside the verdicts in these cases, in order to interpose the statute of limitations, I should probably be met by the same enquiry, and the result would be the same.

I therefore beg to suggest that before taking a step which would again expose the Government to the imputation of attempting to repudiate a decision established by itself, and which, for aught we know, these very plaintiffs may have acted in good faith upon, you should call the attention of the Secretary to this decision of the Department and await his reply.

As to the case of Opdyke et al. vs. Schell, I am now assured, and it was so stated on the trial, that the vessel by which the importation was made, on which the excess of duty was exacted, arrived at this port June 9th, 1857.

27 The arrival of a vessel at a port of entry with intention to discharge her cargo constitutes an importation. (See U. S. vs. Vowell, 5 Cranch, 368.)

The short statute of limitation you refer to applies to importation made on and after July 1, 1857, (see section 5 of March 3d, 1857.) If the importation was made prior to July 1st, 1857, then the statute of March 3d, 1857, does not apply.

If there had been an error in the amount, that should be corrected either by opening the judgment, or, as the plaintiff's counsel suggests, by consenting to a remission of the excess.

Very respectfully, yours,

E. DELAFIELD SMITH,
U. S. Dist. Att'y.

K.

And the said plaintiffs, as to the plea of the said defendant by him first above pleaded, and whereof he hath put himself upon the country, do the like.

And the said plaintiffs, as to the plea of the said defendant by him secondly above pleaded, say that the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that the said defendant hath not paid the several sums of money i the complaint of the said plaintiffs mentioned, in manner and form as the said defendant hath above in his said plea in that behalf alleged.

And this the said plaintiffs pray may be inquired of by the country.

And for a further reply the said plaintiffs, by leave of the court here

for this purpose first had and obtained, according to the form of the statute in such case made and provided, as to the plea of the said defendant, by him lastly above pleaded, say that the said defendant
28 ought not to be admitted or received to plead said plea, because
they say that in the latter part of the year 1856, and also in or about the month of May, 1857, and before the expiration of six years from the time when said several sums of money were by these plaintiffs paid to and had and received by the said defendant, as in the complaint of the said plaintiffs mentioned, the said defendant, agreeably to instructions received by him from the Secretary of the Treasury of the United States, dated October 4th, 1856, and May 27th, 1857, promised and agreed to and with these plaintiffs that the said statute of limitations should not be pleaded in case the plaintiffs should, in pursuance of such instructions so issued by said Secretary, duly file with the collector of the port of New York, at the custom house in the city of New York, their claim for the refund of the said several sums of money in the complaint of the said plaintiffs mentioned, within six years after said several sums of money were by these plaintiffs paid to and had and received by the said defendant.

And the said plaintiffs say that their said claims for refund were duly filed in pursuance of the said instructions, and of the said promise and agreement with said collector, in and during the years 1856 and 1857; and that said plaintiffs fully relied and depended upon the faithful performance thereof, and this the said plaintiffs are ready to verify.

Wherefore they pray judgment if the said defendant ought to be admitted or received against the said promise or agreement to plead the plea by him lastly above pleaded.

And for a further reply in this behalf the said plaintiffs, by leave of the court here, for this purpose first had and obtained, according to the form of such statute in such case made and provided, as to the plea of the said defendant, by him lastly above pleaded, say:

That the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, be-
29 cause they say that the said defendant did, within six years next
before the commencement of this suit, renew and ratify his said promise to pay the said several sums of money in the complaint of the said plaintiffs mentioned, and this the said plaintiffs are ready to verify Wherefore they pray judgment, &c.

And for a further reply in this behalf, the said plaintiffs, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, as to the plea of the said defendant, by him lastly above pleaded, say:

That the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that after the said several causes of action in the said complaint mentioned had accrued to the said plaintiffs, the said defendant departed from and resided out of the State of New York for a long time, to wit, for the period of about eleven months, and this the said plaintiffs are ready to verify. Wherefore they pray judgment, &c.

And for a further reply in this behalf, the said plaintiffs, by leave of the court here for this purpose first had and obtained, according to the form of the statute in such case made and provided, say:

That they ought not to be barred from having and maintaining their aforesaid action against the said defendant by reason of anything by

the said defendant alleged in his said plea lastly above pleaded, because they say that before the expiration of six years from the time when the right of action in the plaintiffs' complaint mentioned accrued to these plaintiffs, the said defendant, by act of Congress of March 3, 1863, was discharged from all personal liability to repay the said several sums of money in the complaint of the said plaintiffs mentioned, officially col-
lected by the said defendant, and paid into the Treasury of the
30 United States, but that it was made the duty of the Secretary of
the Treasury of the United States, by said act of Congress of
March 3, 1863, to repay the said several sums of money, officially collected by the said defendant, upon the recovery of a judgment against said defendant in a suit brought against him, in his official capacity, to recover said several sums of money, and that said Secretary of the Treasury, within six years next before the commencement of this suit, did undertake and promise to pay the said several sums of money in the complaint of the said plaintiffs mentioned; and the said plaintiffs further say that the said defendant did, during the time he was such collector of the port of New York, pay over to the United States the moneys exacted by him, as collector, from these plaintiffs, and by them paid to him, as in said complaint mentioned, on the condition, trust, and agreement that the United States should and would undertake and assume to bear and be responsible for all claims that should be made against him, as such collector, for moneys received and exacted by order of the Treasury Department.

That the moneys so paid by these plaintiffs to the said defendant, as in said complaint mentioned, were so exacted.

That this suit is, in fact, defended by the United States, and that before the expiration of six years from the time when said moneys were paid to the said defendant by these plaintiffs, and by said defendant paid over to the Treasury of the United States, and within six years next before the commencement of this action, the said Secretary of the Treasury of the United States did officially promulgate and make known, and promise and agree to and with these plaintiffs, that the statute of limitations should not be pleaded as to any claims for refund of money so officially collected, accruing within six years next prior to the commencement of a test suit in such cases, when such test suit had been decided in favor of the claimants, and such decision acquiesced by
the Treasury Department.

31 That test suits for the recovery of such moneys, as is in the
complaint of the said plaintiffs mentioned, so officially collected, had been commenced in the courts of the United States, in the years 1855 and 1856, and determined in favor of the plaintiffs therein, and the decisions therein had been acquiesced in by the Treasury Department, by letters of instruction issued by the Secretary of the Treasury, dated October, 1856, and May, 1857.

And this the said plaintiffs are ready to verify. Wherefore they pray judgment and their damages by them sustained, to be adjusted, &c.

L.

And the said defendant, as to the said replication of the said plaintiffs to the said second plea of the said defendant, and which the said plaintiffs have prayed may be inquired of by the country, doth the like.

And the said defendant says that the said several replications of the said plaintiffs to the said last plea of the said defendant, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law for the said plaintiffs to have or maintain their aforesaid action thereof against him, the said defendant; and that he, the said defendant, is not bound by law to answer the same, and this he, the said defendant, is ready to verify. Wherefore, for want of a sufficient replication in this behalf, he, the said defendant, prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against him.

And the said defendant, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of demurrer in law to the said several replications, that is to say: That the said replications are double, in this, that although
32 an order has heretofore been entered allowing the said plaintiffs
to reply to the said last plea of said defendant, several matters specified in said order, yet the said several matters lastly set forth by the said plaintiffs in their said last replication to the said plea of the said defendant are not specified in said order, and have been so replied by the said plaintiffs without leave of the court first had and obtained.

And also for that the said several replications are in other respects uncertain, informal, and insufficient, &c. And the said plaintiffs say that the said replication to the said last plea of the said defendant, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for them, the said plaintiffs, to have and maintain their aforesaid action thereof against the said defendant, and the said plaintiffs are ready to verify and prove the same, as the court shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said replication to the last plea of the said defendant, nor hitherto in any manner denied the same, the said plaintiffs pray judgment, and their damages, by reason of the non performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, &c.

33 Circuit court of the United States for the northern district of New York. In equity.

OTTO ANDRAEA ET AL.
vs.
HEMAN J. REDFIELD.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Almon W. Griswold, being duly sworn, says that he is the agent and attorney of each and every of the above-named complainants; that he has read the foregoing bill of complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. That deponent is the person referred to in the said bill of complaint as the agent and attorney of the said several complainants. That deponent's knowledge of the truth of the facts stated in said bill, and his grounds of the belief in the truth thereof, are derived from conversations with the said complainants and from conversations had with the defendant, and from interviews and conversations with the officers of the customs at the port of New York, and with various officers in the Department of the United States Treasury, in Washington; and from the letters and communications of the various officers of the Government of the United States, copies of some of which are annexed to the said bill of complaint, and from his em-

34 ployment as the agent and attorney of the said complainants, in and about the recovery from the said defendant of the said several sums so illegally exacted by the defendant. That deponent has been the agent and attorney for the several and respective complainants in and about the protesting and objecting against such illegal exaction of duties by the defendant, and in and about the collection from the defendant of the several sums so illegally exacted by the defendant on the importations of merchandise, as stated and set forth in the said bill of complaint; and that all the facts and circumstances set forth in the said bill of complaint relating to the said illegal imposition of such duties, the protest made by the complainants against the said illegal exaction and the payment of the same, and the various acts, facts, and circumstances as set forth in the said bill, and relating to the repayment of the said sums to the said complainants respectively, and the several conversations had with the defendant in relation to such illegal exaction and the repayment thereof to the complainants, and the alleged statements made by him in relation thereto are, and each of them is, true, to the personal knowledge of this deponent.

That all the facts and allegations in the said bill of complaint setting forth the acts of the attorney or agents of the said several complainants and the acts, conversations, and statements of the defendant, and the acts and statements of the officers of the customs and of M'r S. G. Ogden, the said auditor, are true to the personal knowledge of this deponent. That all the facts and circumstances set forth in said bill relating to said several claims and to the statute of limitations, and the promise and agreement on the part of the defendant not to plead the statute of limitations as a defense to any suit to be brought by any of said complainants to recover said excessive duties, are true to the personal knowledge of this deponent.

That all the facts and circumstances set forth in said bill in re-
35 spect to the bringing of the said several suits against the said
defendant, and the declarations, pleas, replications, and demurrers, and the argument of such demurrers, and the decision of the court thereon, are true to the personal knowledge of this deponent.

That the reason why this bill is verified by deponent is that the several complainants have acted in regard to the collection of their said several claims by and through this deponent, as their agent and attorney, and that all the said facts referred to herein are within the personal knowledge of deponent, and not within the personal knowledge of the said complainants.

ALMON W. GRISWOLD.

Subscribed and sworn to before me this 6th day of March, 1874.
[L. S.] WALTER W. SCHELL.
Notary Public, N. Y. Co.

Circuit court of the United States for the northern district of New York.
In equity.

OTTO ANDREAE ET AL.
vs.
HEMAN J. REDFIELD.

NORTHERN DISTRICT OF NEW YORK, *ss:*

Samuel G. Ogden, being duly sworn, on oath deposes and says: He is and has been for 32 years auditor in the New York custom-

36 house. That by virtue of his position as auditor he has charge of the refunding of duties overpaid, whether by decision of the Treasury Department, or upon judgment of the court. That he has carefully read the annexed bill in equity, in which Bernard Andreae and others are plaintiffs, and Heman J. Redfield is defendant, and so much of said bill as relates to the interviews between deponent and the attorney of the plaintiffs, and to the representations and declarations made by deponent to said attorney are true, according to deponent's best recollections and belief.

(Signed) S. G. OGDEN.

Sworn to and subscribed before me this twenty-sixth day of February, A. D. 1874.

[L. S.] *JAMUEL J. JACOBS,*
Notary Public.

Circuit court of the United States for the northern district of New York
In equity.

OTTO ANDREAE ET AL.
vs.
HEMAN J. REDFIELD.

NORTHERN DISTRICT OF NEW YORK, *ss:*

James T. Griswold, being sworn, says: That he is no relation to A. W. Griswold, the attorney for the plaintiffs in these cases. That he was the refunding clerk in the auditor's department of the custom-house in New York for about nine years prior to February, 1861.

37 That it was his duty during that time to adjust all claims for return of duties illegally or erroneously exacted, including cases decided by the courts as well as those by instructions from the Secretary of the Treasury.

That deponent remembers that in the latter part of the year 1856, the Secretary of the Treasury issued instructions directing the collector of customs to prepare and transmit to the Department for payment certified statements of duties paid under protest on sea freight and charges; and in May, 1857, similar instructions were issued in relation to duties overpaid on commissions. Upon these instructions being promulgated, a large number of claims for return of such duties were presented to the collector and came to the desk of deponent, as refunding clerk; orders for the invoices and entries were indorsed thereon and checked by the auditor, and the lists sent to the record office for the papers to be got up and brought down to deponent to enable him to make the adjustment; some of these claims were adjusted, certified, and transmitted to the Treasury Department for payment, and were paid. Portions of others, just as the record-clerk happened to get up the papers and bring them to deponent, were also adjusted and paid. There were many others, however, presented at the time which were not adjusted in part even, owing to the increase and accumulation of business at deponent's desk, and the delay in obtaining the necessary papers from the record-office, without which the statements of the amounts could not be prepared; and the adjustment of these cases was entirely suspended by M'r Schell, when he came into office as collector, in July, 1857; and though he was directed by the Secretary of the Treasury to resume the adjustment of them, it was not done, and a large number were sued and verdicts obtained in court in 1860 and 1861.

That among these claims presented in 1857, 1858, and 1859, which
remained unadjusted at the time deponent left the office in 1861,
38 he recognizes those of the plaintiff in the sixty several suits commenced against Heman J. Redfield, in May, 1864. Deponent remembers that while the adjustment of these cases was suspended, in 1858 or 1859, M'r Griswold, the attorney for a number of claimants, spoke about the statute of limitations beginning to run, when deponent explained to him that the practice of the custom-house, authorized and recognized by the Treasury Department, was to allow, in the adjustment of all claims authorized to be refunded, all items paid within six years from the time the claim was presented, or application was made at the custom-house, and always allowing the time during which the collector to whom the money was paid may have been absent from the State; and deponent remembers going with said Griswold to the auditor, S. G. Ogden, who confirmed deponent's statement, and assured said Griswold that the statute did not run against a claim after it had been recognized by the Department and presented at the custom house for adjustment. Deponent would also remark that in the adjustment of error cases, as they are called—that is, excess of duty paid by mistake and without protest—the Department fixed, as the statute of limitation, one year within which application must be made for the return of the excess paid, or it was disallowed; if the application was made within a year, that was sufficient to entitle the claimant to receive his money at the earliest moment it was convenient for the collector to adjust and certify the amount to the Treasury Department for payment; so in regard to protested cases, if the application for a return of duties illegally exacted was made within six years, that was deemed sufficient; and such was the practice during the time deponent was in office.

JAMES T. GRISWOLD.

Subscribed and sworn to before me this 26th day of February, 1874.
[L. S.] WALTER W. SCHELL.
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court, northern district of New York. Otto Andreae et al., complainants, vs. Heman J. Redfield. Bill in equity. Abram W. Griswold, solicitor and of counsel for pl'ff. Charles Tracy, of counsel for pl'ff, 59 Liberty st., New York. Filed March 11, 1874.

39, 40 Circuit court of the United States for the northern district of New York, March term, 1874. In equity.

The demurrer of Heman J. Redfield, defendant, to the bill of complaint of Otto Andreae and others, complainants.

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill to be true, in such manner and form as the same are therein set forth and alleged, demurs thereto, and for cause of demurrer shows—

That the said complainants have not, in and by their said bill, made or stated such a case as does or ought to entitle them to any such discovery or relief as is thereby sought and prayed for, from or against this defendant.

Wherefore this defendant demands the judgment of this honorable court, whether he shall be compelled to make any further or other answer to the said bill, or any of the matters and things therein contained.

and prays to be hence dismissed with his reasonable costs in this behalf sustained.

WEBSTER & CRAIG,
Solicitors for Defendant.

SIDNEY WEBSTER,
Of Counsel.

41 U. S. circuit court, northern district of New York. In equity.

OTTO ANDREAE AND OTHERS, COMPL'TS,
vs.
HEMAN J. REDFIELD, DEF'T.

STATE OF VIRGINIA,
County of Albemarle, ss:

Heman J. Redfield, being duly sworn, deposes and says that he is the above-named defendant, and that the demurrer hereto annexed to the complainants' bill in this cause is not interposed for delay.

HEMAN J. REDFIELD.

Sworn to before me this 30th day of March, 1874.

GEORGE PERKINS, *N. P.*

I certify that I am counsel for the defendant, Heman J. Redfield, in the above cause, and that the demurrer interposed by the said defendant to the complainants' bill therein is, in my opinion, well founded in point of law.

SIDNEY WEBSTER.

Dated New York, March 27, 1874.

VIRGINIA,
County of Albemarle, to wit:

I, Jno. W. Goss, clerk of the county court of Albemarle County, State of Virginia, do hereby certify that George Perkins, whose genuine signature appears in the above certificate, is a duly commissioned and qualified notary public for the county & State aforesaid, & that his acts as such are entitled to full credit.

Given under my hand & the seal of the s'd court annexed this 30 March, 1874.

JOHN W. GOSS, *C'k.*

42 (Indorsed:) U. S. circuit court, northern district of N. Y. Otto Andreae et al. vs. Heman J. Redfield. In equity. Demurrer, affidavit, and certificate of counsel. Webster & Craig, sol'rs for def't, 29 Nassau s't, New York. Filed April 1, 1874.

43 NORTHERN DISTRICT OF NEW YORK, *ss:*

THE UNITED STATES OF AMERICA:

Circuit court of the United States for the northern district of New York, in the second circuit.

J. STEINER ET AL. *vs.* H. J. REDFIELD.
S. BOICEAU ET AL. *vs.* H. J. REDFIELD.
J. S. GOURD ET AL. *vs.* H. J. REDFIELD.
F. M. PEYSER ET AL. *vs.* H. J. REDFIELD.

W. Brunner et al. *vs.* H. J. Redfield.
C. Gignoux et al. *vs.* H. J. Redfield.
A. Schniewind et al. *vs.* H. J. Redfield.
L. Curtis et al. *vs.* H. J. Redfield.
S. Guilliame et al. *vs.* H. J. Redfield.
A. Arnold et al. *vs.* H. J. Redfield.
F. Cottenet et al. *vs.* H. J. Redfield.
S. Guilliame et al. *vs.* H. J. Redfield.
B. Badcock et al. *vs.* H. J. Redfield.
C. F. Dambmann et al. *vs.* H. J. Redfield.
C. O. Hurd et al. *vs.* H. J. Redfield.
S. T. Berly *vs.* H. J. Redfield.
H. De Goer et al. *vs.* H. J. Redfield.
M. L. Hallowell et al. *vs.* H. J. Redfield.
C. E. Borsdorff et al. *vs.* H. J. Redfield.
A. Edwards et al. *vs.* H. J. Redfield.
H. Hennequin et al. *vs.* H. J. Redfield.
F. Cottenlet et al. *vs.* H. J. Redfield.
H. Gourd et al. *vs.* H. J. Redfield.
C. Gignoux et al. *vs.* H. J. Redfield.
44 L. Heidenheimer et al. *vs.* H. J. Redfield.
H. Lewis et al. *vs.* H. J. Redfield.
F. A. Spies et al. *vs.* H. J. Redfield.
A. Iselin et al. *vs.* H. J. Redfield.
L. Musey et al. *vs.* H. J. Redfield.
F. Schuchardt et al. *vs.* H. J. Redfield.
A. Iselin et al. *vs.* H. J. Redfield.
L. Passavant et al. *vs.* H. J. Redfield.
John W. Schullin et al. *vs.* H. J. Redfield.
D. Lane et al. *vs.* H. J. Redfield.
C. Payen et al. *vs.* H. J. Redfield.
B. Andreae et al. *vs.* H. J. Redfield.
D. Lane et al. *vs.* H. J. Redfield.
C. Payen et al. *vs.* H. J. Redfield.
A. B. Strange et al. *vs.* H. J. Redfield.
I. Lehmaier et al. *vs.* H. J. Redfield.
O. Andreae et al. *vs.* H. J. Redfield.
E. B. Strange et al. *vs.* H. J. Redfield.
I. S. Little et al. *vs.* H. J. Redfield.
F. Rusch et al. *vs.* H. J. Redfield.
S. Strahlheim et al. *vs.* H. J. Redfield.
William Loeschigk et al. *vs.* H. J. Redfield.
F. Rusch et al. *vs.* H. J. Redfield.
John Syz et al. *vs.* H. J. Redfield.
William Loeschigk et al. *vs.* H. J. Redfield.
L. Rosenfeldt et al. *vs.* H. J. Redfield.
A. B. Sheriott *vs.* H. J. Redfield.
William Loeschigk et al. *vs.* H. J. Redfield.
F. A. Spies et al. *vs.* H. J. Redfield.
J. A. Ubsdell et al. *vs.* H. J. Redfield.
45 C. Vyse et al. *vs.* H. J. Redfield.
R. Waller et al. *vs.* H. J. Redfield.
A. Wetter *vs.* H. J. Redfield.
C. Vyse et al. *vs.* H. J. Redfield.
E. Warburg et al. *vs.* H. J. Redfield.
O. Zollikoffer et al. *vs.* H. J. Redfield.

It is hereby stipulated that the above-entitled causes go off the calender for the present term of this court, and that unless brought on by the plaintiffs and tried, and finally submitted for decision before the Hon. L. B. Woodruff, or some other judge of the United States court to be designated by him to hear the same, at his chambers or elsewhere, in the city of New York, before the first day of the term of this court, to be held at Canandaigua on the 3rd Tuesday of June next, that final judgment shall be entered on or after the first day of said term in favor of the defendant, with costs in each and every of the above-entitled causes, whether the failure to try and finally submit said causes be owing to the neglect or refusal of said judge to hear the same, or to any other cause, saving only the neglect or refusal of defendant to proceed with the trial thereof after proper notice.

Dated New York, March 16, 1874.

ALMON W. GRISWOLD,
Att'y for Pl'ffs in each of above entitled Causes.
WEBSTER & CRAIG,
Att'ys for Def't in each of above-entitled Causes.

46 The above stipulation is hereby cancelled by consent.
New York, April 27, 1874.

WEBSTER & CRAIG,
Def't's Attorneys.
ALMON W. GRISWOLD,
Pl'ffs' Att'y.

(Indorsed:) U. S. circuit court, northern district of New York. J. Steiner et al. vs. Heman J. Redfield, & 59 other causes. Stipulation, &c., & consent cancelling same. A. W. Griswold, att'y for pl'ffs in each of within causes, 59 Liberty s't, New York. Filed May 14, 1874.

47 U. S. circuit court, northern district of New York. In equity.

OTTO ANDREAE ET AL.
vs.
HEMAN J. REDFIELD.

After hearing the motion for an injunction in this case upon the bill filed herein March 17, 1874, and the arguments of counsel for the respective parties, and due deliberation had, it is ordered and adjudged by the court that the defendant and his attorneys and solicitors be strictly enjoined from proceeding and insisting upon the trial of any of said sixty suits in a court of law, upon the pleas of the statute of limitations, until the further order of the court, on condition that the plaintiffs in each of the aforesaid sixty suits named in the bill, file a stipulation with the clerk of this court that in case they recover judgment against the defendant therein, a certificate of probable cause shall be issued by the court rendering the judgment; and further, that neither of the plaintiffs shall in any event issue execution, or enforce said judgment in any way against said Redfield or his property.

Dated New York, April 30th, 1874.

D. A. SMALLY, *Judge.*

48 (Indorsed:) U. S. circuit court, northern district of N. Y. Otto Andreae et al. vs. Heman J. Redfield. In equity. Order. A. W. Griswold, pl'ffs' solicitor, 59 Liberty st., New York. Filed May 5, 1874.

49 NORTHERN DISTRICT OF NEW YORK, *ss:*

THE UNITED STATES OF AMERICA:

Circuit court of the United States for the northern district of New York, in the second circuit.

O. ANDRAE ET AL. *vs.* H. J. REDFIELD.
W. BRUNNER ET AL. *vs.* H. J. REDFIELD.
J. S. GOURD ET AL. *vs.* H. J. REDFIELD.
B. ANDREAE ET AL. *vs.* H. J. REDFIELD.
L. CURTIS ET AL. *vs.* H. J. REDFIELD.
H. GOURD ET AL. *vs.* H. J. REDFIELD.
A. ARNOLD ET AL. *vs.* H. J. REDFIELD.
F. COTTENET ET AL. *vs.* H. J. REDFIELD.
C. GIGUOUX ET AL. *vs.* H. J. REDFIELD.
B. BABCOCK ET AL. *vs.* H. J. REDFIELD.
F. COTTENET ET AL. *vs.* H. J. REDFIELD.
C. GIGUOUX ET AL. *vs.* H. J. REDFIELD.
F. BERLY ET AL. *vs.* H. J. REDFIELD.
C. F. DAMBMANN ET AL. *vs.* H. J. REDFIELD.
S. GUILLAUME ET AL. *vs.* H. REDFIELD.
C. E. BORSDORFF ET AL. *vs.* H. J. REDFIELD.
H. DE GOER ET AL. *vs.* H. J. REDFIELD.
S. GUILLAUME ET AL. *vs.* H. J. REDFIELD.
S. BOILLAN ET AL. *vs.* H. J. REDFIELD.
A. EDWARDS ET AL. *vs.* H. J. REDFIELD.
C. D. HURD ET AL. *vs.* H. J. REDFIELD.
50 M. L. HALLOWELL ET AL. *vs.* H. J. REDFIELD.
WILLIAM LOESCHIGK ET AL. *vs.* H. REDFIELD.
L. ROSENFELDT ET AL. *vs.* H. J. REDFIELD.
H. HENNEQUIM ET AL. *vs.* H. J. REDFIELD.
WILLIAM LOESCHIGK ET AL. *vs.* H. J. REDFIELD.
F. A. SPIES ET AL. *vs.* H. J. REDFIELD.
S. HEIDENHEIMER ET AL. *vs.* H. J. REDFIELD.
H. LEWIS ET AL. *vs.* H. J. REDFIELD.
F. A. SPIES ET AL. *vs.* H. J. REDFIELD.
A. ISELIN ET AL. *vs.* H. J. REDFIELD.
L. MUSEY ET AL. *vs.* H. J. REDFIELD.
F. SCHUCHARDT ET AL. *vs.* H. J. REDFIELD.
A. ISELIN ET AL. *vs.* H. J. REDFIED.
S. PASSAVANT ET AL. *vs.* H. J. REDFIELD.
JOHN W. SCHULTEN ET AL. *vs.* H. J. REDFIELD.
D. LANE ET AL. *vs.* H. J. REDFIELD.
C. PAYEN ET AL. *vs.* H. J. REDFIELD.
J. STEINER ET AL. *vs.* H. J. REDFIELD.
D. LANE ET AL. *vs.* H. J. REDFIELD.
C. PAYEN ET AL. *vs.* H. J. REDFIELD.
A. SCHNIEWIND ET AL. *vs.* H. J. REDFIELD.
I. LEHMAIER ET AL. *vs.* H. J. REDFIELD.
F. M. PEYSER *vs.* H. J. REDFIELD.
A. B. STRANGE ET AL. *vs.* H. J. REDFIELD.
J. S. LITTLE ET AL. *vs.* H. J. REDFIELD.
F. RUSCH ET AL. *vs.* H. J. REDFIELD.
E. B. STRANGE ET AL. *vs.* H. J. REDFIELD.
WILLIAM LOESCHEGK ET AL. *vs.* H. J. REDFIELD.
F. RUSCH ET AL. *vs.* H. J. REDFIELD.

S. Stahlheim et al. *vs.* H. J. Redfield.
51 John Syz et al. *vs.* H. J. Redfield.
C. Vyse et al. *vs.* H. J. Redfield.
E. Warberg et al. *vs.* H. J. Redfield.
A. B. Sheriott et al. *vs.* H. J. Redfield.
C. Vyse et al. *vs.* H. J. Redfield.
A. Weller *vs.* H. J. Redfield.
J. A. Ubsdell et al. *vs.* H. J. Redfield.
R. Waller et al. *vs.* H. J. Redfield.
O. Zollikoffer et al. *vs.* H. J. Redfield.

It is hereby stipulated and agreed that in case the plaintiffs in any of the above-entitled actions shall recover judgment against the defendant, Herman J. Redfield, that a certificate of probable cause shall be issued by the court rendering the judgment; and it is hereby further stipulated that the plaintiffs in neither of the said cases shall in any event issue execution or enforce said judgments, in any way, against said Redfield or his property.

Dated New York, April 30th, 1874.

ALMON W. GRISWOLD,
Att'y for Pl'ffs in each of the Foregoing Causes.

52 (Indorsed:) U. S. circuit court, northern district of N. Y. Otto Andreae et al. vs. Heman J. Redfield, and 59 other causes, vs. the same. Pl'ffs' stipulation, &c. A. W. Griswold, pl'ffs' att'y, 59 Liberty st., New York. Filed May 5, 1874.

53 U. S. circuit court, northern district of N. Y. In equity.

Honorable Ward Hunt, justice.

Otto Andreae et al.
vs.
Heman J. Redfield.

Canandaigua, *June* 17, 1874.

A motion having been made to continue the injunction granted by Judge Smally, on the 30th day of April, 1874, restraining the defendant from proceeding to trial upon the pleas of the statute of limitations until the further order of the court, and the justice and propriety of such continuance having been duly considered by the court, now here, on motion of Charles Lee Clarke, of counsel for the plaintiffs, it is ordered, adjudged, and decreed that the restraint upon claiming the benefit of the pleas was valid and should be continued, and it is ordered that the same be continued accordingly.

54 (Indorsed:) U. S. circuit court, north. dist. of N. Y. In equity. Otto Andreae et al. vs. Heman J. Redfield. Order continuing injunction. Filed June 17, 1874.

55, 56 At an adjourned term of the circuit court of the United States for the northern district of New York, held at the United States court-rooms in the city of Utica, in and for said northern district of New York, on the 16th day of March, in the year one thousand and seventy-five.

Present, the honorable circuit judge.

Otto Andreae and Bernhard Andreae, partners composing the firm of Andreae & Company; and also the said Bernhard An-

dreae and Otto Andreae the younger, partners composing the firm of Andreae & Company; and also Aaron Arnold, Richard Arnold, James M. Constable, Joseph S. Barker, Clark L. Sharpstein, and Leonard Jacobs, partners composing the firm of Arnold, Constable & Company; and also Benjamin Babcock and Van Zant M. Moore, partners composing the firm of Babcock & Moore; and also Frederick Berly; and also Charles E. Borsdorff and Herman Winter, parties composing the firm of Borsdorff & Winter; and also Samson Boicean and Ferdinand Rusch, parties composing the firm of Boicean & Rusch; and also William Brunner, Samuel Brunner, and John J. Brunner, partners composing the firm of William Brunner & Company; and
57, 58 also Lewis Curtis, Benjamin Curtis, and Henry A. Booream, parties composing the firm of L. & B. Curtis & Company; and also Francis Cottenet and Henry L. Atherton, parties composing the firm of F. Cottenet & Company; and also Francis Cottenet and Henry L. Atherton, partners composing the firm of Cottenet & Atherton; and also Charles F. Dambmann and Philip F. Pistor, partners composing the firm of C. F. Dambmann & Company; and also Hypolite De Goer and Joseph Rifflard, partners composing the firm of H. De Goer & Rifflard; and also Alfred Edwards and Richard Roe, partners composing the firm of Alfred Edwards & Company; and also John S. Gourd and Henry Gourd, partners composing the firm of Gourd Frères; and also Henri Gourd and John S. Gourd, partners composing the firm of Gourd Frères; and also Claudius Gignoux, Tileston Cushing, and Charles A. Christmas, parties composing the firm of C. Gignoux & Company; and also Samuel Guillaume, Amader Fargis, Anthony Mages, and Sebastian Dupons, partners composing the firm of Guillaume, Fargis & Company; and also Samuel Guillaume, Amàder Fargis, and Anthony Mages, partners composing the firm of Guillaume, Fargis & Company; and also Chauncey D. Hurd and John W. Shelton, partners composing the firm of John W. Shelton
59, 60 & Hurd; and also Morris L. Hallowell & John Doe, partners composing the firm of M. L. Hallowell & Company; and also Henry Hennequin and Duncan McDougall, partners composing the firm of H. Hennequin & Company; and also Louis Heidenheimer, Sigmund Meyerheimer, and Adolph Mack, partners composing the firm of L. Heidenheimer & Company; and also Adrian Iselin, Ernest Girand, and Henry J. Barbey, partners composing the firm of A. Iselin & Company; and also Adrian Iselin and Ernest Giraud, partners composing the firm of A. Iselin & Company; and also David Lane and John Lamson, partners composing the firm of Lane, Lamson & Company; and also David Lane, John Lamson, and Alfred Woodbridge, partners composing the firm of Lane, Lamson & Company; and also John Lehmaier and Martin H. Lehmaier, partners composing the firm of Lehmaier Brothers; and also James S. Little, Paul Alden, and James M. Dunbar, partners composing the firm of Little, Alden & Company; and also William Loeschigk, Otto Wesendonck, and Anthony Shafer, partners composing the firm of Loeschigk, Wesendonck & Company; and also William Loeschigk, Otto Wesendon'k, and Gustavus Kutter, partners composing the firm of Loeschick, Wesendonck & Company; and also William Loeschigk, Otto Wesendonck, Gustavus Kutter, and Edward Luckameyer, partners
61, 62 composing the firm of Loeschigk, Wesendonck and Company; and also Henry Lewis, junior, Joseph W. Lewis, and Walter H. Lewis, partners composing the firm of Lewis Brothers; and also Leon Musey and Frederick Gottier, partners composing the firm of Musey

& Gottier; and also Theodore Passavant and Herman Passavant, partners composing the firm of F. Passavant & Company; and also Charles Payen, L. Payen, and Augustus P. Sheriott, partners composing the firm of C. Payen & Company; and also Charles Payen and Augustus P. Sheriott, partners composing the firm of C. Payen & Company; and also Frederick M. Peyser; and also Ferdinand Rusch and Adolph Rusch, partners composing of F. & A. Rusch; and also Ferdinand Rusch, John G. Escher, and Adolph Rusch, partners composing the firm of Rusch, Escher & Rusch; and also Lewis Rosenfeld, Natalik Rosenfeld, and Isaac Rosenfeld, partners composing the firm of L. Rosenteld & Brothers; and also Frederick A. Spies, George Christ, and Edward Christ, partners composing the firm of Spies, Christ & Company; and also Frederick A. Spies, George Christ, and Louis Jay, partners composing the firm of Spies, Christ & Jay; and also Ferdinand Schuchardt, John M. C. Frolick, Henry Holthauten, Frederick Schuchardt, and Frederick C. Gebhardt, partners com-
63, 64 posing the firm of Schuchardt, Frolick & Holthauten; and also John W. Shulten and Chauncey D. Hurd, partners composing the firm of J. W. Shulten & Hurd; and also J. Steiner, J. P. Steiner, and Richard Roe, partners composing the firm of J. & J. P. Steiner & Company; and also Adolphus Schinewind and John Doe, partners composing the firm of Schinewind & Company; and also Albert B. Strange and Edward B. Strange, partners composing the firm of Strange Brothers; and also Edward B. Strange and Albert B. Strange, partners composing the firm of E. B. Strange and Company; and also Simon Strahlheim and Arnold Friedman, partners composing the firm of S. Strahlheim & Company; and also John Syz and Charles W. Funk, partners composing the firm of J. Syz & Company; and also Augustus B. Sheriott; and also John A. Ubsdell, Charles Pierson, and George G. Lake, partners composing the firm of Ubsdell, Pierson & Lake; and also Charles Vyse, Thomas A. Vyse, junior, and John Reynaulds, partners composing the firm of Vyse & Sons; and also Charles Vyse and Thomas A. Vyse, junior, partners composing the firm of Vyse & Sons; and also Robert Waller; and also Edward Warburg and Julius Goetz, partners composing the firm of Edward Warburg & Company; and also August Welter; and also Os-
65, 66 car Zollikoffer and William Blank, partners composing the firm of Zollikoffer & Blank, complainants,

vs.

HERMAN J. REDFIELD, DEFENDANT.

In equity.

This cause having been heretofore heard upon the pleadings filed thereit, at Albany, on the second Tuesday of October last past, and the said pleadings having been read, and Mr Charles Lee Clarke, of counsel for the complainants, and Mr Sidney Webster, of counsel for the defendant, having been heard, and the court having duly considered the said pleadings and arguments, it is ordered, adjudged, and decreed, that the defendants' demurrer to the complainant's bill of complaint be sustained, and that the said bill of complaint in this cause be dismissed.

And it is further ordered and decreed, that the said complainants do pay to the defendant the costs of this suit, to be taxed, and that the defendant have an execution against the said complainants, according to the course and practice of this court.

W. J. WALLACE,
Judge.

67 (Indorsed:) U. S. circuit court, north district of N. Y. In equity. Otto Andreae et al. vs. Heman J. Redfield. Order sustaining demurrer & dismissing bill, &c. Filed March 15, 1875.

Wherefore the costs of the defendant are taxed at fifty-seven dollars and thirty-five cents, by consent.

Whereupon the said pleadings, orders, decree, and other papers required are attached together and hereto annexed, and the said decree is signed and enrolled according to law.

Judgment signed and decree enrolled this 9th day of April, A. D. 1875.

CHARLES MASON,
Clerk.

68 (Indorsed:) U. S. circuit court, north dist. of N. Y. In equity. Otto Andreae et al. vs. Heman J. Redfield. Enrolled decree. Webster & Craig, def't's sol'rs. Costs, $57.35. Filed April 9, 1875, 5 o'clock p. m.

69 Circuit court of the United States for the northern district of New York. In equity.

OTTO ANDREAE AND OTHERS
vs.
HEMAN J. REDFIELD.
} In equity.

On demurrer to bill of complaint.

70 Woodruff, J.:

The bill of complaint herein is filed by the several plaintiffs in sixty separate actions at law, each brought to recover from the defendant an alleged excess of duty illegally exacted by the defendant while collector of the port of New York. The payment of the various amounts exacted in excess of duty is alleged to have been made under protest by the respective plaintiffs in the actions at law, at various dates in the years 1853, 1854, 1855, 1856, and 1857. It is not stated in the bill on what precise day the said several sixty actions at law were commenced, but it is inferrible from what is stated, that they were commenced in May, 1864, about seven years after the defendant went out of office, as such collector, which was July 1st, 1857. In November, 1866, he pleaded in those actions, among other defences, the staute of limitations. To the replications to those pleas demurrers were interposed, but issue
71 was finally joined in April, 1872, and the cases were in apparent
readiness for trial for several terms, but were postponed from term to term. In March, 1874, this bill was filed, the several plaintiffs in those actions at law uniting herein as complainants. The defendant has filed a general demurrer. The only relief sought by the bill is an injunction to restrain the defendant "from prosecuting or maintaining, upon the trial of any of the said sixty suits, his plea of the statute of limitations, and from claiming or insisting on said trials, upon any defence thereunder, and from, in any way or manner, claiming or pretending, in said sixty actions, or any of them, that the statute of limitations is a bar thereto."

The alleged excess of duty consists of two items or particulars: 1st. That in ascertaining the dutiable value of the goods imported, the defendant erroneously included the expense of transportation from the principal market in the country, from which they were imported, to the place of shipment. 2d. That he erroneously included in such dutiable value a higher rate of commissions than the usual or customary rate for purchases made at the places from which the importations were made.

The bill is liable to some criticism for want of clearness, certainty, and definiteness in many particulars; and it introduces many matters which occurred after the defendant ceased to be collector, to which he was not a party, which, even if they tend to show that the duties were illegally assessed, as matter of law, ought not, in any manner, otherwise to prejudice the defendant, nor to affect his right to defend the said actions by any legal defence. It may be gathered from the bill that the facts relied on as grounds for the injunction are, that at some time—the bill does not state when, though its language may, perhaps, warrant the inference that it was prior to February 1st, 1856—the circuit court of the United States for the southern district of New York, and the circuit court of the United States for the district of California, in suits in like cases, brought by other importers, decided that similar exactions
72 were illegal; that the amounts of the exactions in those cases were refunded by the Secretary of the Treasury; that, on the 1st of February, 1856, the Secretary of the Treasury published a general regulation, declaring that freight or transportation from the foreign port of shipment to the port of importation, or from the place of production or manufacture to another port, for shipment or transhipment to the United States, is not a dutiable charge; that, on the 4th of October, 1856, the Secretary of the Treasury addressed a letter to this defendant in these words:

"SIR: On application being made to you by Mess'rs A. Iselin & Co. and others, of New York, you are authorized and directed to cause to be prepared the usual certified statements for return of 'duty on freight,' in such cases where the same has been found to have been paid in excess, as decided by this Department in general regulations, No. 63, p. 22, and under written protest, and transmit the same to this Department for its consideration."

And that on the 27th of May, 1857, the Secretary of the Treasury addressed another letter to the defendant in the following terms:

"SIR: I am in receipt of your letter of the 26th inst., transmitting a report of the U. S. appraisers in relation to the 'usual commissions' charged in China, Sweden, Norway, Holland, and German ports, and have to state, in reply, that you will cause to be prepared and transmitted to this Department the usual certified statements of return of the duty exacted in error, in all cases where it is found that the said duty has been on a rate of commission greater than the usual rate chargeable in the above-named countries."

It is not averred in the bill that any of the goods imported by the complainants in this suit were imported from either of the countries named in this letter, nor are the terms of general regulation No. 63 stated so as to show specifically that the claims of these complainants in the several actions at law were embraced within the said letter of the previous 4th of October. These facts are, however, assumed as at least recognizing the principle claimed by the complainants, and the bill avers that
73 these letters determined and established the complainant's right to the return of the excess of moneys "so paid by them severally for duties," though it is not alleged that these letters were communicated to them by the Secretary of the Treasury as a guide to their conduct in bringing suits, or otherwise, or were written or intended for the purpose of influencing them in that matter.

If, however, it were conceded that the rights of the complainants to have returned to them the moneys so paid, or the moneys for which they ultimately brought their said several actions, were thereby determined and established, it is not very obvious that these letters constituted an excuse to the plaintiffs for not bringing suits within six years after their causes of action accrued, which should deprive the defendant of his defence, unless it be on the ground that a court of equity should, in all cases, enjoin a defendant from setting up the statute of limitations as a bar, if it appear clear that the cause of action was originally good and valid, as to which the observations of the court, touching the purpose and policy of statutes of limitations as statutes of repose, in Levy v. Stewart, (11 Wallace, at p. 249,) United States v. Wiley, (11 Wallace, at p. 513,) and Leffingwell v. Warren, (2 Black, 599,) are of some significance. The power of a court of equity cannot be invoked to annul statutes of limitation on any such ground.

The bill then avers that the complainants furnished to the auditor of the New York custom house statements of particulars, to enable him to prepare the certified statements called for by the aforesaid instructions of the Secretary of the Treasury, and that, before November 1st, 1859, all the particulars of their claims were furnished to such auditor. The occurrences which—if it be conceded that the plaintiffs had, prior thereto, valid causes of action—alone bear on the question, whether the complainants give such reasons as should move a court of equity to exercise the extraordinary power of enjoining the defendant from availing himself of his legal defence to suits brought against him, are, in substance, as alleged in the bill, the following: That, in the summer
74 of 1859, the plaintiffs' attorney suggested to such auditor, M'r S. G. Ogden, a subordinate in the New York custom-house, that the statute of limitations would apply to said claims, and the period of limitation of six years would expire, in some of the cases, on the 1st of November, 1859, and, in the residue of the cases before July, 1863, and that he supposed it might be necessary to commence suits before November 1st, 1859, on all the claims, to prevent the statute from becoming a bar; that to this the said auditor replied, imputing it to the fault of the then collector, M'r Schell, that the money was not refunded, stating that the instructions given to such then collector in May, 1858, (which included, in substance, the above letter of October 4th, 1856,) were peremptory, and further stating that all the plaintiffs had to do to prevent the statute of limitations from running was to present their claims, in each case, to the refunding clerk in the auditor's office for adjustment, upon which presentation, by the rules and practice of the Treasury Department, the statute ceased to run; also, that if all the plaintiffs should commence suits for the recovery of these debts which the Secretary had already ordered to be refunded it would justify the Department in the belief that it was done for the purpose of accumulating bills of costs, and must necessarily annoy the Department and unfavorably prejudice the Department against the plaintiffs and their claims, and that it was not necessary to commence suits to prevent the statute from running, but only to present the claims; that afterwards, in or about September, 1859, the said attorney conversed with the defendant herein, (who had ceased to be collector,) and stated to him what the auditor, M'r Ogden, had said, to which the defendant replied that he had no longer any control over the adjustment of these claims, and, as far as he was concerned, Auditor Ogden had the whole charge of the matter, who must be, from his long experience, familiar with the practice of the Department, and the attorney could rely upon the accuracy

of M'r Ogden's statements; that shortly thereafter, at a meeting of the said attorney and said Ogden and the defendant, said Ogden
75 stated to the defendant, as he had before to the attorney, that,
according to the practice of the Department, if the plaintiffs had already psesented their claims for refunding, or if they would do so, the statute ceased to run from the date of such presentation, as effectually as if suit was commenced; and he corroborated his assertions by referring the defendant to decisions of the Department to that effect, and at the same time expressed his belief that Collector Schell would yet be persuaded to resume the adjustment; and that the defendant thereupon said he saw no necessity for suing on these cases, and if the plaintiffs had presented or would present ther claims for adjustment the statute ceased to run from that time, and could not and would not be interposed as a defence to the payment of them, and he concurred with M'r Ogden in the expressed opinion that Collector Schell would soon resume the adjustment of them, and added that of course these claims would all be paid.

The bill also avers that, relying on the matters aforesaid, and for the purpose of avoiding a multiplicity of suits, the plaintiffs refrained from bringing action immediately, in full faith and confidence that the statute of limitations would not be set up as a defence in case suits should be brought on said claims at any time afterwards. As already suggested, there are other matters stated in the bill, to which the defendant was not a party, which tend to show that the Government officers regarded claims of the nature of those alleged to be embraced in those sixty actions as valid, and constituting grounds for refunding whatever excess appeared, upon investigation, to have been paid. But it does not appear that these claims of the complainants were ever adjusted, and their specific nature, or the amounts thereof, ever ascertained, so as to be submitted to the Treasury Department in a form which, under the instructions referred to in the bill, would enable the Secretary of the Treasury to consider them, pass upon their legality or their amount, or give any order to pay them.

The case made by the bill may be briefly, but, we think, completely, for all the purposes of the demurrer, stated as follows, assuming, of course, the facts alleged:

76 The complainants had just and legal claims to be repaid the
excess of duties paid by them under protest, upon certain goods imported, and the defendant was liable to them therefor. The statutes of limitation were about to take effect, as a bar to an action for such excess, and the plaintiffs contemplated bringing suits An officer in the New York custom-house stated to the plaintiffs' attorney that, by the rules and practice of the Treasury Department, the presentation of their claims to the auditor or to the refunding-clerk at the custom-house prevented the running of the statute of limitations, and, if so presented, and suit was thereafter brought, that statute could not be and would not be interposed as a defence. The defendant, disclaiming any control in the matter, but declaring his confidence in the experience and knowledge of such officer, expressed to the plaintiffs' attorney his concurrence in the statement and opinion thus given. The plaintiffs did present their claims, and, in reliance upon the recognition by the Secretary of the Treasury of claims of the like nature, and upon the statements and opinion of such officer and the concurrence of the defendant therein, refrained from bringing suit until after the statute had run against all of the claims. Suits having been then brought and the defendant having interposed the statute or limitations as a bar, the complainants, seven

years and upwards after these pleas of the statute of limitations were filed, apply to this court, as a court of equity, to restrain the defendant from insisting upon the statute as a defence.

If it were true that the interposition of this defence by the defendant was inequitable, in such sense that it created a cause of action in equity, the lapse of time since the pleas were interposed, exceeding another limitation of six years, furnishes the plausible suggestion, at least, that the complainants, at so late a day, and after keeping the defendant so long in the court of law, are entitled to slight favor. Courts of equity expect of applicants for the exercise of extraordinary jurisdiction that they apply promptly, so soon as occasion arises. If this lapse of seven years since these pleas were filed be not held a bar to the complain-
77 ants' prayer for what they deem equitable relief, it creates doubt whether, at so late a day, this court ought to interfere in their behalf. But, without resting any conclusion upon this view of the complainants' position in the controversy, we have deemed it proper to examine the bill to see what, divested of much of obscurity, indefiniteness, and want of precision, it can fairly and as a matter of substance be said to present, as an appeal to a court of equity to exercise the extraordinary power of interference with the defendant's clear legal right.

The case obviously suggests the inquiry, are the sixty actions at law to be regarded, for the purposes of this suit, as actions against the United States, or as actions against the defendant therein? The counsel for the plaintiffs insist, as we understand them, that they should be deemed actions against the United States; and yet the bill of complaint, by its allegations, would seem to be designed to deal with the case, on some points, as if the defendant were defendant in fact and in law as well as in form, and, on other points, as if the United States was the real defendant, and as if the formal defendant was only defendant in form and has no real interest therein.

1. If the actions are to be treated as if they were actions against the Government, then how can the Government be prejudiced by any opinion, representation, or constructive promise made or expressed by the defendant, and, especially, by any opinion, representation, or constructive promise made or expressed after he ceased to be an officer of the Government? We are of opinion that, if such be the view we ought to take of those actions at law, the Government cannot be so prejudiced. While the complainants are insisting that, for all purposes in a court of equity, those actions are against the Government, in which the nominal defendant has no interest, still his opinion and alleged representations, long after the causes of action arose, and long after he ceased to be an officer of the Government, are made, in the bill of complaint, prominent ground of that reliance which, as they aver, led them to refrain from bringing their actions. If it be true that, for the purposes of this
78 suit, the defendant has no interest in those actions, then he has, or should have, no control of those actions; then he could not do or say anything which would affect, or which should be permitted to affect, the rights of the Government. It would necessarily follow that all that is averred in the bill touching his assurances or representations, must be disregarded as irrelevant or immaterial. Thereupon, the complainants' case in this court would stand, and their claim to an injunction would rest, on these facts, viz. the Secretary of the Treasury has recognized the validity of all claims of the like nature, and the complainants were assured by an auditor in the New York custom-house that the practice of the Treasury Department was not to plead the statute of limitations in such cases, and that the statute did not run after the

claims were presented to him or to a clerk in his office, and could not and would not be interposed, and, in reliance upon this, the complainants omitted to sue until the period of limitation had expired. On the question whether, in this aspect of the case, any just ground for an injunction can be found, some observations will be made in the farther discussion which follows. In disposing of the demurrer to certain replications in the actions at law, the opinion was expressed that the statute which, under certain circumstances, makes it the duty of the Secretary of the Treasury to pay the judgments, if any should be recovered against the defendant, had not barred him of any legal defence to the actions brought against him. We are inclined still to the opinion that nothing in that statute was intended to operate to place the defendant at a disadvantage in a court of equity, and enable the Government officers, by their acts, after the cause of action had accrued against him, to deprive him of his defence or defences. In that view, we suggest that, although the counsel for the complainants repudiate that view of his relation to the suits, and claim that the actions should be treated as actions against the United States, it is proper to consider the case in its other aspect.

2. If, then, the actions at law are to be dealt with as, in law and
79 in fact, as well as in form, actions against the defendant, then,
clearly, the defendant is not to be prejudiced by anything whatever said or done by the Government or its officials (without his concurrence) after he collected the money for which he is sued, and, especially, after he ceased to be collector, which was long before these actions were brought against him; nor can anything so said or done create any equity in favor of the complainants as against him. In this aspect of his relation to the actions at law, he may defend himself and his property by any lawful means; and can a court of equity properly restrain him, except upon the ground that he, himself, has said or done something which deprives him of his defence? Certainly not; and, if not, then this case and the prayer of the complainants for an injunction stand upon the mere conversation alleged to have been had with him in September, 1859, in which he expressed his concurrence in the opinion and statements of Mr Ogden, the auditor of the New York custom-house.

It is proper to add, in support of the view that the actions at law in question are, in fact as well as in form, actions against the defendant; that, if judgments be recovered therein, they become liens upon his real estate, and although, by a provision in the 12th section of the act of Congress of March 3d, 1863, (12 U. S. Stat. at Large, 741,) which is now found in section 989 of the Revised Statutes, it may, upon certain conditions, become the duty of the Secretary of the Treasury to pay the judgments, it cannot be now asserted, in advance of the trial, that such duty will become absolute. Suppose that such payment should not, in fact, be made, can it be said that the defendant has no interest in the question of recovery or no recovery against him; and, especially, suppose that the court before which the trial may be had should not deem the case, as developed on the trial, one in which a certificate of probable cause ought to be granted, how, then, is the defendant to avoid the payment, protect his property from an execution, or relieve his estate from the lien of the judgment? We are not advised that there is anything
in the Revised Statutes of the United States which makes these
80 actions any less actions against the defendant; and sections 3009
to 3014 do not seem to us to change the nature of these actions, or deprive the defendant of any defence which he would otherwise be entitled to interpose.

When these actions were brought against this defendant he was not a Government officer. He is not sued as such officer, in any such sense that the suit proceeds against his successor in office. He must abide the result, and must pay the judgments, if judgments be recovered against him, unless, first, the conditions be fulfilled hereafter, upon which he may obtain indemnity from the Government, and unless, also, it shall become the duty of the Secretary to pay the judgments, and that duty shall be performed.

We are informed that, on a motion for an injunction herein, pendente lite, the plaintiffs were required, as a condition of granting the motion, to stipulate that, whatever facts might de developed on the trial, a certificate of probable cause might be granted, to the end that no execution might issue against the property of the defendant. If this could otherwise affect our determination, no such fact is before us on this demurrer to the bill of complaint. But we ought not to pass by the argument founded thereon, without observing that the plaintiffs cannot change the essential nature of their actions against the defendant, by any such stipulation made by themselves; and, second, which we conceive to be of greater and more obvious importance, that it would be a fraud upon the Government to permit parties, by stipulation, to cast upon the Government officers the duty to pay a judgment recovered against an individual. Whether a certificate of probable cause ought or ought not to be granted, is for the determination of the judicial tribunal, upon the facts developed on the trial; and the interests of the Government, and the duty of the Government to pay, are not left to the determination or choice of the plaintiffs in the actions. If it should be held that the question, whether the Government shall be required to pay the judgments may be decided by the plaintiffs therein, the Government 81 would be exposed to abuses and to collusion. This view might be illustrated by various supposable cases, but it seems too obvious to require it.

Viewing the actions at law as actions against the defendant, further suggestions are pertinent to the question whether he can be prejudiced or affected by the acts of the Government or its officials. The defendant had retired from the office of collector. He was a private citizen. He is sued by the complainants, to recover money which they allege he, when collector, exacted from them illegally. Now, it may be conceded that all legitimate sources of information may be resorted to by the court to assist in the inquiry whether, upon facts which may be proved, the collections which he made were or were not, when made, illegal. But it is, we think, equally clear that neither the Government officers nor any authority of the Government can create a liability, either at law or in equity, which he did not incur: and we deny that either a subordinate in the New York custom-house, or even the Secretary of the Treasury himself, could deprive the defendant of his right to defend by any defence valid and legal for his protection.

3. To any suggestion that the actions at law may be regarded as of a mixed nature—in some possible contingencies, against the defendant, in other contingencies, as practically against the Government—it must suffice to say that this avails nothing in answer to the suggestions already made. In so far as the actions are to be treated as against the defendant, he is entitled to complete protection. He cannot be prejudiced by the acts, representations, or opinions of Government officials, and, unless by something said or done by himself he has lost his legal defences, he must be permitted to urge them, and have judgment thereon in his favor, if the defences be valid; and this terminates the suits. On the other hand, in so far as these actions can be regarded (if at all

as actions against the Government, it is true, as suggested in a previous
point, that the acts, representations, or opinions of this defend-
82 ant, after he ceased to be an officer of the Government, cannot,
either at law or in equity, prejudice the United States.

4. In any aspect of the case, what is the substance of the claim of the plaintiffs to a decree, and on what does such claim rest ? On the argument of the demurrer to the plaintiffs' replications, (whereon an opinion was delivered, not reported,) it was claimed that there was an agreement not to plead the statute of limitations, made either by the defendant or by the Government officers, or by both. Several criticisms are pertinent to any such suggestion. The auditor of the New York custom-house had no authority whatever to bind the Government by any such agreement ; and he did not profess to do so. He only assumed to state the rules and practice of the Treasury Department of the United States, to give an opinion upon the legal effect of the presentation of the complainants' claims to the auditor or refunding-clerk, and to express the belief that the statute of limitations would not, after that, be urged as a defence to a suit or suits. This sufficiently, we think, disposes of any idea of contract by the Government not to permit the statute to be pleaded, if it were conceded that any such contract could affect the defendant.

As to any idea of an agreement by the defendant, in the nature of a contract with the complainants—the conversation with the defendant, alleged in the bill of complaint, was so obviously the mere expression of an opinion as to what the Department of the Treasury and the then collector would do towards the adjustment and payment of the claims, and a concurrence in the opinions of the auditor, that it cannot import any undertaking on the part of the defendant whatever. Besides, viewed as a contract, it had in it no element of mutuality. There was no consideration therefor. The complainants did not agree not to sue, or to forbear for any period, short or long. On the contrary, they had the power, and the unimpeded right, to sue immediately. How, then,
was the running of the statute hindered ? They did sue as soon
83 as they deemed it for their interest. In this view, and, indeed, in
every possible view of the subject, the inquiry is pertinent, how
long after this conversation, upon the complainants' theory, might they delay—for ten years, or for twenty—and still claim that the statute could not be pleaded as a defence ?

Again, the courts of the United States recognize and give effect to the statutes of limitation of the States in which those courts exercise their jurisdiction. This is well settled. (See some cases collected in the opinion in in re Cornwall, 9 Blatchf. C. C. R., at p. 127.) The cause of action here in question arose in the State of New York. The defendant was then, and when these suits were brought, a resident of the State of New York. This court exercises its jurisdiction within the State of New York, and, in the construction of the statutes of the State, and in declaring their effect, has respect to the decisions of the State courts. The statute of limitations of that State, from the protection of which the complainants desire to exclude the defendant, declares (Code of Procedure, § 110) that "no acknowledgment or promise shall be sufficient evidence of a * * * continuing contract, whereby to take the case out of the operation of" the statute, "unless the same be contained in some writing, signed by the party to be charged thereby." And the court of last resort in that State, in Shapley v. Abbott, (42 N. Y., 443,) hold that a parol agreement not to plead the statute cannot operate as an acknowledgment of the debt, nor as a new promise, nor

as a waiver of the statute; and, finally, that, although relied upon very much, as it is alleged the complainants relied upon the circumstances stated in this bill, it does not operate as an estoppel in pais to preclude the defence. Shall this court, as a court of equity, say that a parol agreement not to plead the statute will take a case out of the operation of the statute, when a parol promise to pay would not? Especially shall they say so of, at the utmost, a mere declaration of opinion, or even of intention, not to plead the statute, founded on no consideration, and
involving no mutuality of agreement? To do so would com-
84 pletely defeat the design of the statute to protect parties against
perjury, by requiring that no promise shall have such effect if
not in writing and signed, &c. In this connection, it may be proper to bear in mind that no actual fraud is alleged or claimed in this bill to have been practised upon these complainants.

5. This brings us to the argument forcibly urged upon our attention, which was, however, considered in Shapley v. Abbott, above referred to, that the defendant is estopped to insist upon the statute as a defence. This claim requires, as already suggested, that it be first determined who is, for the purposes of this suit, to be deemed the real defendant in the actions at law. If it be the Government, as the complainants now insist, then the statements and representations of the defendant, after he ceased to be collector, should be laid out of view. What facts have the Government stated or represented, so as to create an estoppel? Statutes, rules, and regulations of the Treasury Department, if they show that the complainants once had a legal claim, if the facts be as stated in the bill, go no further. These do not affect the validity of the defence of the statute of limitations, either at law or in equity, if the complainants do not prosecute their once legal claim within the time limited. Can a subordinate officer in the custom-house make representations, either touching the past or the future, which can estop the Government in a case like the present? He is not appointed or authorized for any such purpose or with any such power. What he said or did was not in the receipt of money paid to him, or which he was authorized to receive, or in respect of which he was executing a general authority, such as enables agents, sometimes, to bind their principal by contemporaneous acts or declarations. The money was in the Treasury of the United States. He had no power or authority to bind the Government by prescribing the terms or conditions upon which it should be refunded to the complainants.

But what is it alleged that he represented? Nothing of sub-
85 stance, except that, by the rules and practice of the Department
of the Treasury, the presentation of the claim put an end to the
running of the statute of limitations, and such statute could not and would not, thereafter, be set up as a bar. If that statement was an opinion, that, as matter of law, the presentation of the claims prevented the running of the statute, then, of course, it estopped no one. As a statement of a fact, it had no effect as an estoppel. It may, for the purposes of the question, be deemed the statement of the truth. Suppose that the rules and practice were as stated. Could not the Department of the Treasury change them at pleasure? The argument would make such a practice, once begun, forever binding and unchangeable, for, the moment an attempt was made to depart from it by setting up the statute of limitations as a defence, a court of equity would be called upon, as here, to enjoin the defence. All else that was said by the auditor was prospective. It had reference to the future conduct of a defence to a suit or suits which might thereafter be brought. If full

authority to make the statement on behalf of the Government were conceded, it was, at most, promissory. This is not of the nature of an estoppel in pais. In truth, it was but the expression of opinion, either of the law or of what the Treasury Department would do in the future. Such an opinion is no estoppel. But the want of authority in this official, already adverted to, is sufficiently conclusive, apart from these last-mentioned distinctions.

If, on the other hand, we again treat the defendant as, for the purposes of this suit, the real party in interest, then the considerations arising out of the terms of the New York statute apply, and the decision of the New York court of appeals is pertinent; and, besides this, his conversation is subject to like observations as are above made on the conversation of the Auditor. Fairly interpreted, all that the defendant is alleged to have said to the complainants' attorney had reference to the future conduct of the Government or the Secretary of the Treasury in the matter, and was a concurrence in the views of M'r
Ogden, accompanied with an express disavowal or protest that
86 he, the defendant, had any control in the adjustment and refund-
ing which the attorney was urging. How, in the face of that
protest, and of his express reference to the judgment and experience of M'r Ogden, for information as to what the Government would do, could the complainants rely upon anything said by him as binding any one in any form? It is, however, unnecessary to pursue the discussion in that aspect, since the complainants, on the argument of the demurrer, insist that we should regard the Government, and not the nominal defendant, as the real party, and, if so, the acts or declarations of the defendant after he ceased to be an officer of the Government cannot estop the latter. We add, however, that we are unable to find in either aspect of the case any sufficient ground for declaring that either are estopped to make any legal defence to these actions at law which may be available. There are many other views bearing upon the sufficiency of this bill, which have been adverted to on the argument in support of the demurrer, but we deem it unnecessary to pursue further a discussion already greatly protracted.

It is easy to group all the circumstances detailed in this bill of complaint, and, assuming that the claims of the complainants were originally just and legal, say that the complainants ought not to be vexed and hindered by such a defence; that the Government ought to have refunded their money; that the complainants did wait in reliance upon the circumstances detailed in the bill; that, although they may have been unwise in so long delaying to sue, they did not suppose that their rights would be prejudiced thereby; that, even now, the Government ought to refund the money; and that, unless there is some suspicion of unfairness or fraud, some loss of evidence bearing upon the justice of their claims, or the amount thereof, or reason to believe that delay in bringing suit has wrought some prejudice or endangered some right, or there is danger in establishing a precedent, or some reason othe than appears on the mere face of this bill, then the interposition of such a defence by or at the instance of the Government, enabling it to retain
money wrongfully gotten into the Treasury, and against import-
87 ers who would seem to have been long and patiently doing what
they could, short of suing, to obtain their rights, is ungracious,
and invites an effort to avoid the effect of the statute, if possible. But we have not been able to find grounds upon which, on principles of law or equity, a court of equity can interfere.

It is suggested that as an injunction pendente lite was granted in

this court, and upon this bill, we ought to deem the question res adjudicata, or ought at least to follow such allowance of the injunction as an authority. This would have saved us much time and labor; it would have been a throwing off of responsibility, quite grateful to us, if we had deemed it consistent with the proper discharge of duty. But the granting of a preliminary injunction has for its precise object the retaining of all things in their then condition until the case can be deliberately heard or examined upon the issues finally made for hearing or trial. It is provisional merely. It is granted as matter of discretion. It is often, and properly, granted where the question is important and doubtful. When the case comes to be finally heard on the merits, and judgment is to be pronounced, the court are bound to apply to it the rules that govern the rights of the parties; and there is nothing provisional in such judgment. They then finally settle those rights. Until that can or should be done, a temporary injunction is often a discreet exercise of the power of the court to see that nothing is done pendente lite which will impede the doing of what may be finally adjudged to be right in the matter in controversy. But for this preliminary injunction, the defendant might have pressed the actions at law to trial and judgment before this case could be heard and decided, so as to become the subject of further review, if the parties so desired. Decisions of the court granting or refusing a preliminary injunction are not conclusive either upon the court or the parties, and are not intended to be so, in a subsequent disposition of the cause by a decree. We are, therefore, not wanting in due respect to the court or the judge by whom the preliminary injunction was granted. On the contrary, our convictions
tend to the belief, that, if sitting with us on the hearing of this
88 demurrer, his conclusion must be the same as our own deliberate
judgment.

The demurrer must be sustained, and the usual decree dismissing the bill, with costs, be entered, unless the complainants wish to amend. In that case, leave should be given, on the usual terms.

Almon W. Griswold for the plaintiffs.

Webster & Craig for the defendant.

(Endorsed:) Circuit court of the United States for the northern district of New York. Otto Andreae et al. vs. Heman J. Redfield. Opinion. Filed January 19, 1875.

89 *Bond for costs.*

Circuit court of the United States of America for the northern district of New York, in the second circuit. In equity.

Otto Andreae et al.
vs.
Heman J. Redfield.

Know all men by these presents that we, Almon W. Griswold, of the city, county, and State of New York, and Augustus Heydenreich, of New Brighton, Richmond County and State of New York, are held and firmly bound unto the above-named Heman J. Redfield in the sum of five hundred dollars, to be paid to the said Heman J. Redfield, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the nineteenth day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas the above-named Otto Andreae et al. have prosecuted an appeal to the Supreme Court of the United States, from the de-
90 cree dismissing the bill of complaint to reverse the said decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the northern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named Otto Andreae et al. shall prosecute the said appeal to effect, and answer all damages and costs if they fail to make such appeal good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

ALMON W. GRISWOLD. [SEAL.]
A. HEYDENREICH. [SEAL.]

Sealed and delivered and taken and acknowledged this 19th day of April, 1875, before me.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Almon W. Griswold and Augustus Heydenreich, named in within bond, being duly sworn, depose and say, and each for himself says, that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

91 ALMON W. GRISWOLD.
A. HEYDENREICH.

Sworn to this nineteenth day of April, A. D. 1875, before me.

JOSEPH GUTMAN, JR.,
United States Commissioner, S. D. N. Y.

92 (Indorsed:) Vol. , page . U. S. circuit court. Otto Andreae et al. vs. Heman J. Redfield. In equity. Copy bond for costs on appeal. Almon W. Griswold, proctor for pl'ff, 59 Liberty st., New York. The within bond is satisfactory to the defendant. Sidney Webster, attorney. Filed April 22, 1875.

93 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the circuit court of the United States for the northern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you between Otto Andreae and Bernhard Andreae, partners, composing the firm of Andreae & Company; and also the said Bernhard Andreae and Otto Andreae, the younger, partners, composing another firm of Andreae & Company; and also Aaron Arnold, Richard Arnold, James M. Constable, Joseph P. Barker, Clark L. Sharpstein, and Leonard Jacobs, partners, composing the firm of Arnold, Constable & Company; and also Benjamin Babcock and Van Zant M. Moore, partners, composing the firm of Babcock & Moore; and also Frederick Berly; and also Charles E. Borsdorff and Hermann Winter, partners, composing the firm of Borsdorff & Winter; and also Samson Boiceau and Ferdinand Rusch, partners, composing the firm of Boiceau & Rusch; and also William Brunner, Samuel
94 Brunner, and John J. Brunner, partners, composing the firm of

William Brunner & Company; and also Lewis Curtis, Benjamin Curtis,
and Henry A. Booream, partners, composing the firm of L. & B. Curtis
& Company; and also Francis Cottenet and Henry L. Atherton, partners,
composing the firm of F. Cottenet & Company; and also Francis
Cottenet and Henry L. Atherton, partners, composing the firm of Cottenet
& Atherton; and also Charles F. Dambmann & Philip F. Pistor,
partners, composing the firm of C. F. Dambmann & Company; and also
Hippolyte De Goer and Joseph Rifflard, partners, composing the firm of
H. De Goer & Rifflard; and also Alfred Edwards and Richard Roe, partners,
composing the firm of Alfred Edwards & Company; and also John
S. Gourd and Henry Goard, partners, composing the firm of Gourd
Frères; and also Henri Gourd and John S. Gourd, partners, composing
the firm of Goard Frères; and also Claudius Gignoux, Tileston Cushing,
and Charles H. Christmas, partners, composing the firm of C. Gignoux
& Company; and also Samuel Guillaume, Amadée Fargis, Anthony
Mages, and Sebastian Dupons, partners, composing the firm of Guillaume,
Fargis & Company; and also Samuel Guillaume, Amadee Fargis,
and Anthony Mages, partners, composing the firm of Guillaume,
95 & Company; and also Chauncey D. Hurd and John W. Schulten,
partners, composing the firm of John W. Schulten & Hurd: and
also Morris L. Hallowell & John Doe, partners, composing the firm of
M. L. Hallowell & Company; and also Henry Hennequin & Duncan
McDougall, partners, composing the firm of H. Hennequin & Company;
and also Louis Heidenheimer, Sigismund Meyerheimer, and Adolph Mack,
partners, composing the firm of L. Heidenheimer & Company; and also
Adrian Iselin, Ernest Giraud, and Henry J. Barbey, partners, composing
the firm of A. Iselin & Company; and also Adrian Iselin and Ernest
Giraud, partners, composing the firm of A. Iselin & Company; and also
David Lane and John Lamson, partners, composing the firm of Lane &
Lamson; and also David Lane, John Lamson, and Alfred Woodbridge,
partners, composing the firm of Lane, Lamson & Company; and also
John Lehmaier and Martin H. Lehmaier, partners, composing the firm of
Lehmaier Brothers; and also James S. Little, Paul Alden, and James M.
Dunbar, partners, composing the firm of Little, Alden & Company; and
also William Loeschigk, Otto Wesendonck, and Anthony Schafer, partners,
composing the firm of Loeschigk, Wesendonck & Company; and
also William Loeschigk, Otto Wesendonck, and Gustavus Kutter, partners,
composing the firm of Loeschigk, Wesendonck and Company;
96 and also William Loeschigk, Otto Wesendonck, Gustavus Kutter,
and Edward Luckemeyer, partners, composing the firm of Loeschigk,
Wesendonck & Company; and also Henry Lewis, junior, Joseph
W. Lewis, and Walter H. Lewis, partners, composing the firm of Lewis
Brothers; and also Leon Musey and Frederick Goltier, partners, composing
the firm of Musey & Goltier; and also Theodore Passavant and
Herman Passavant, partners, composing the firm of T. Passavant &
Company; and also Charles Payen, L. Payen, and Augustus B.
Theriott, partners, composing the firm of C. Payen & Company; and also
Charles Payen and Augustus B. Theriott, partners, composing the firm
of C. Payen & Company; and also Frederick M. Peyser; and also Ferdinand
Rusch and Adolp Rusch, partners, composing the firm of F. &
A. Rusch; and also Ferdinand Rusch, John G. Escher, and Adolph
Rusch, partners, composing the firm of Rusch, Escher & Rusch; and also
Lewis Rosenfeld, Naftali K. Rosenfeld, and Isaac Rosenfeld, partners,
composing the firm of L. Rosenfeld & Bothers; and also Frederick A.
Spies, George Christ, and Edward Christ, partners, composing the firm
of Spies, Christ & Company; and also Frederick A. Spies, George Christ,

and Louis Jay, partners, composing the firm of Spies, Christ &
97 Jay; and also Ferdinand Schuchardt, John M. C. Frolick, Henry
Holthausen, Frederick Schuchardt, and Frederick C. Gebhardt,
partners, composing the firm of Schuchardt, Frolick & Holthausen; and
also John W. Schulten and Chauncey D. Hurd, partners, composing the
firm of J. W. Schulten & Hurd; and also J. Steiner, J. P. Steiner, and
Richard Roe, partners, composing the firm of J. & J. P. Steiner & Company;
and Adolphus Schniewind and John Doe, partners, composing
the firm of Schniewind & Company; and also Albert B. Strange and Edward
B. Strange, partners, composing the firm of Strange Brothers; and
also Edward B. Strange and Albert B. Strange, partners, composing the
firm of E. B. Strange & Brother; and also Simon Strahlheim and Arnold
Friedman, partners, composing the firm of S. Strahlheim & Company;
and also John Syz and Charles W. Fank, partners, composing the firm
of J. Syz & Company; and also Augustus B. Theriott; and also John A.
Ubsdell, Charles Peirson, and George G. Lake, partners, composing the
firm of Ubsdell, Peirson & Lake; and also Charles Vyse, Thomas A.
Vyse, junior, and John Reynaulds, partners, composing the firm of Vyse
& Sons; and also Charles Vyse and Thomas Vyse, junior, partners, composing
the firm of Vyse & Sons; and also Robert Waller; and
98 also Edward Warburg and Julius Goetz, partners, composing the
firm of Edward Warburg & Company, and also August Wetter;
and also Oscar Zollikoffer and William Blank, partners, composing the
firm of Zollikoffer & Blank, complainants, and Heman J. Redfield, defendant,
a manifest error hath happened, to the great damage of the said
Otto Andreae and others, as by their complaint appears; and we are
willing that the error, if any there hath been, should be duly corrected,
and full and speedy justice done to the parties aforesaid in this behalf,
do command you, if judgment be therein given, that then, under your
seal, distinctly and openly, you send the record and proceedings aforesaid,
with all things concerning the same, to the Supreme Court of the
United States, together with this writ, so that you have the same at
Washington on the 2nd Monday of October next, in the said Supreme
Court to be then and there held, that, the record and proceedings aforesaid
being inspected, the said Supreme Court may cause further to be
done therein to correct that error what of right and according
99 to the law and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 22d day of April, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

[SEAL.]

CHARLES MASON,
Clerk of the Circuit Court of the United States
for the Northern District of New York.

A. W. GRISWOLD,
Solicitor for Appellants.

(Indorsed:) U. S. circuit court northern district of N. Y. Otto Andreae et al. vs. Heman J. Redfield. In equity. Writ of error. A. W. Griswold, compl'ts' solicitor. Allowed. William J. Wallace, judge U. S. dis't court. Filed April 22, 1875.

101 UNITED STATES OF AMERICA, *ss:*

To Heman J. Redfield, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at the Capitol, in the city of

Washington, on the second Monday of October next, pursuant to a writ
of error filed in the clerk's office of the circuit court of the United States
for the northern district of New York, wherein Otto Andreae and Bern-
hard Andreae, partners, composing the firm of Andreae & Company;
and also the said Bernhard Andreae and Otto Andreae the younger,
partners, composing another firm of Andreae & Company; and also
Aaron Arnold, Richard Arnold, James M. Constable, Joseph P. Barker,
Clark L. Sharpstein, and Leonard Jacobs, partners, composing the firm
of Arnold, Constable & Company; and also Benjamin Babcock and
Van Zant M. Moore, partners, composing the firm of Babcock
102 & Moore; and also Frederick Berly; and also Charles E. Bors-
dorff and Hermann Winter, partners, composing the firm of Bors-
dorff & Winter; and also Samson Boiceau and Ferdinand Rusch, part-
ners, composing the firm of Boiceau & Rusch; and also William
Brunner, Samuel Brunner, and John J. Brunner, partners, composing
the firm of William Brunner & Company; and also Lewis Curtis, Ben-
jamin Curtis, and Henry A. Booream, partners, composing the firm of
L. & B. Curtis & Company; and also Francis Cottenet and Henry L.
Atherton, partners, composing the firm of F. Cottenet & Company; and
also Francis Cottenet and Henry L. Atherton, partners, composing the
firm of Cottenet & Atherton; and also Charles F. Dambmann and
Philip F. Pistor, partners, composing the firm of C. F. Dambmann &
Company; and also Hippolyte De Goer and Joseph Rifflard, partners,
composing the firm of H. De Goer & Rifflard; and also Alfred Edwards
and Richard Roe, partners, composing the firm of Alfred Edwards
103 & Company; and also John S. Gourd and Henry Gourd, part-
ners, composing the firm of Gourd Freres; and also Henri Gourd
and John S. Gourd, partners, composing the firm of Gourd Frères; and
also Claudius Gignoux, Tileston Cushing, and Charles H. Christmas,
partners, composing the firm of C. Gignoux & Company; and also Sam-
uel Guillaume, Amadee Fargis, Anthony Mages, and Sebastian Dupons,
partners, composing the firm of Guillaume, Fargis & Company; and
also Samuel Guillaume, Amadée Fargis, and Anthony Mages, partners
composing the firm of Guillaume, Fargis & Company; and also Chaun-
cey D. Hurd and John W. Schulten, partners, composing the firm of
John W. Schulten & Hurd; and also Morris L. Hallowell and John
Doe, partners, composing the firm of M. L. Hallowell & Company; and
also Henry Hennequin and Duncan McDougall, partners, composing
the firm of H. Hennequin & Company; and also Louis Heidenheimer,
Sigmund Meyerheimer, and Adolph Mack, partners, composing the firm
of L. Heidenheimer & Company; and also Adrian Iselin, Ernest
104 Giraud, and Henry J. Barbey, partners, composing the firm of A.
Iselin & Company; and also Adrian Iselin and Ernest Giraud,
partners, composing the firm of A. Iselin & Company; and also David
Lane and John Lamson, partners, composing the firm of Lane & Lam-
son; and also David Lane, John Lamson, and Alfred Woodbridge,
partners, composing the firm of Lane, Lamson & Company; and also
John Lehmaier and Martin H. Lehmaier, partners, composing the firm
of Lehmaier Brothers; and also James S. Little, Paul Alden, and James
M. Dunbar, partners, composing the firm of Little, Alden & Company;
and also William Loeschigk, Otto Wesendonck, and Anthony Schafer,
partners, composing the firm of Loeschigk, Wesendonck & Company;
and also William Loeschigk, Otto Wesendonck, and Gustavus Kutter,
partners, composing the firm of Loeschigk, Wesendonck & Company;
and also William Loeschigk, Otto Wesendonck, Gustavus Kutter, and
Edward Luckemeyer, partners, composing the firm of Loeschigk, Wesen

donck & Company: and also Henry Lewis, junior, Joseph W.
105 Lewis, and Walter H. Lewis, partners, composing the firm of
Lewis Brothers: and also Leon Musey and Frederick Goltier,
partners, composing the firm of Musey & Goltier; and also Theodore
Passavant and Hermann Passavant, partners, composing the firm of
T. Passavant & Company: and also Charles Payen, L. Payen, and
Augustus B. Theriott, partners, composing the firm of C. Payen &
Company: and also Charles Payen and Augustus B. Theriott, partners,
composing the firm of C. Payen & Company; and also Frederick M.
Peyser; and also Ferdinand Rusch and Adolph Rusch, partners, com-
posing the firm of F. & A. Rusch: and also Ferdinand Rusch, John G.
Escher, and Adolph Rusch, partners, composing the firm of Rusch,
Escher & Rusch; and also Lewis Rosenfeld, Naftili K. Rosenfeld, and
Isaac Rosenfeld, partners, composing the firm of L. Rosenfeld and
Brothers: and also Frederick A. Spies, George Christ, and Edward
Christ, partners, composing the firm of Spies, Christ & Company; and
also Frederick A. Spies, George Christ, and Louis Jay, partners,
106 composing the firm of Spies, Christ & Jay; and also Ferdinand
Schuchardt, John M. C. Frohlich, Henry Holthausen, Frederick
Schuchardt, and Frederick C. Gebhardt, partners, composing the firm
of Schuchardt, Frohlich & Holthausen: and also John W. Schulten and
Chauncey D. Hurd, partners, composing the firm of J. W. Schulten &
Hurd: and also J. Steiner, J. P. Steiner, and Richard Roe, partners,
composing the firm of J. & J. P. Steiner & Company; and also Adolphus
Schniewind and John Doe, partners, composing the firm of Schniewind
& Company; and also Albert B. Strange and Edward B. Strange, part-
ners, composing the firm of Strange Brothers; and also Edward B.
Strange and Albert B Strange, partners, composing the firm of E. B.
Strange & Brother: and also Simon Strahlheim and Arnold Friedman,
partners, composing the firm of S. Strahlheim & Company; and also
John Syz and Charles W. Funk, partners, composing the firm of J. Syz
& Company; and also Augustus B. Theriott; and also John A. Ubsdell,
Charles Pierson, and George G. Lake, partners, composing the
107 firm of Ubsdell, Pierson & Lake; and also Charles Vyse, Thomas
A. Vyse, junior, and John Reynaulds, partners, composing the
firm of Vyse & Sons; and also Charles Vyse & Thomas A. Vyse, junior,
partners, composing the firm of Vyse & Sons; and also Robert Waller;
and also Edward Warburg and Julius Goetz, partners, composing the
firm of Edward Warburg & Company: and also August Wetter: and
also Oscar Zollikoffer and William Blank, partners, composing the firm
of Zollikoffer & Bank, are plaintiffs, and you are defendant in error, to
show cause, if any there be, why the judgment in the said writ of error
mentioned should not be corrected and speedy justice should not be
done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States, this 20' day of April, in the year one thousand eight hundred and seventy-five.

W'M J. WALLACE,
Judge U. S. Dist. Court.

108 (Indorsed:) U. S. circuit court, northern district of New York.
Otto Andreae et al. vs. Heman J. Redfield. In equity. Citation.
A. W. Griswold, pl'ff's solicitor, 59 Liberty st., New York. Service of
copy of within admitted this 24th day of April, 1875. Webster & Craig,
solicitors for respondents. Filed April 26, 1875.

109 U. S. circuit court, northern district of New York, 2d circuit. In equity.

OTTO ANDREAE ET AL.
vs.
HEMAN J. REDFIELD.

You will please take notice that the plaintiffs appeal from the judgment or decree of this court sustaining the demurrer, and dismissing the bill of complaint, and from the whole thereof, to the Supreme Court of the United States.

Dated April 19, 1875.

Yours, &c.,

ALMON W. GRISWOLD,
Solicitor for Comp'ts.

To WEBSTER & CRAIG, Esqs.,
Solicitors for Def't.

110 (Indorsed:) U. S. circuit court. Otto Andreae et al. vs. Heman J. Redfield. Notice of appeal. A. W. Griswold, pl'ffs' sol'r. We admit service of a notice of appeal of which the within is a copy. Sept. 30th, 1875. Webster & Craig, def't's sol'r. Filed Oct. 4, 1875.

111 In circuit court of the United States, for the second circuit, in the northern district of New York. January term 1875.

OTTO ANDREAE AND BERNHARD ANDREAE, PARTNERS, COMPOSING the firm of Andreae & Company; and also the said Bernhard Andreae and Otto Andreae the younger, partners, composing another firm of Andreae & Company; and also Aaron Arnold, Richard Arnold, James M. Constable, Joseph P. Barker, Clark L. Sharpstein, and Leonard Jacobs, partners, composing the firm of Arnold, Constable & Company; and also Benjamin Babcock and Van Zant M. Moore, partners, composing the firm of Babcock & Moore; and also Frederick Berly; and also Charles E. Borsdorff and Herman Winter, partners, composing the firm of Borsdorff & Winter; and also Samson Boiceau and Ferdinand Rusch, partners, composing the firm of Boiceau & Rusch; and also William Brunner, Samuel Brunner, and John J. Brunner, partners, composing the firm of William Brunner & Company; and also Lewis Curtis, Benjamin Curtis, and Henry A. Booream, partners, composing the firm of L. & B. Curtis & Company; and also Francis Cottenet and Henry L. Atherton, partners, composing
112 the firm of F. Cottenet & Company; and also Francis Cottenet and Henry L. Atherton, partners, composing the firm of Cottenet & Atherton; and also Charles F. Dambmann and Philip F. Pistor, partners, composing the firm of C. F. Dambmann & Company; and also Hippolyte De Goer and Joseph Riffard, partners, composing the firm of H. De Goer & Riffard; and also Alfred Edwards and Richard Roe, partners, composing the firm of Alfred Edwards & Company; and also John S. Gourd and Henri Gourd, partners, composing the firm of Gourd Frères; and also Henri Gourd and John S. Gourd, partners, composing the firm of Gourd Frères; and also Claudius Gignoux, Tileston Cushing, and Charles H. Christmas, partners, composing the firm of C. Gignoux & Company; and also Samuel Guillaume, Amadee Fargis, Anthony Mages, and Sebastian Dupons, partners, composing the firm of Guillaume, Fargis & Company; and also Samuel Guillaume, Amadee Fargis, and Anthony Mages, partners, composing the firm of Guillaume, Fargis, & Company; and also Chauncey D. Hurd and John W. Shulten, partners, composing the firm of John W. Shulten & Hurd; and also Morris L. Hallowell & John Doe, partners, composing the firm of M. L. Hallowell & Com-

pany; and also Henry Hennequin and Duncan McDougall,
113 partners, composing the firm of H. Hennequin & Company;
and also Lewis Heidenheimer, Sigmund Meyerheimer, and Adolph Mack, partners, composing the firm of L. Heidenheimer & Company; and also Adrian Iselin, Ernest Giraud, and Henry J. Barbey, partners, composing the firm of A. Iselin & Company; and also Adrian Iselin and Ernest Giraud, partners, composing the firm of A. Iselin & Company; and also David Lane and John Lamson, partners, composing the firm of Lane & Lamson; and also David Lane, John Lamson, and Alfred Woodbridge, partners, composing the firm of Lane, Lamson & Company; and also John Lehmaier and Martin H. Lehmaier, partners, composing the firm of Lehmaier Brothers; and also James S. Little, Paul Alden, and James M. Dunbar, partners, composing the firm of Little, Alden & Company; and also William Loeschigk, Otto Wesendonck, and Anthony Schafer, partners, composing the firm of Loeschigk, Wesendonck & Company; and also William Loeschigk, Otto Wesendonck, and Gustavus Kutter, partners, composing the firm of Loeschigk, Wesendonck & Company; and also William Loeschigk, Otto Wesendonck, Gustavus Kutter, and Edward Lukemeyer, partners, composing the firm of Loeschigk, Wesendonck & Company; and also Henry Lewis, junior, Jo-
114 seph W. Lewis, and Walter H. Lewis, partners, composing the
firm of Lewis Brothers; and also Leon Musey and Frederick Goltier, partners composing the firm of Musey & Goltier; and also Theodore Passavant and Herman Passavant, partners, composing the firm of T. Passavant & Company; and also Charles Payen, L. Payen, and Augustus B. Theriott, partners, composing the firm of C. Payen & Company; and also Charles Payen and Augustus B. Theriott, partners, composing the firm of C. Payen & Company; and also Frederick M. Peyser; and also Ferdinand Rusch and Adolph Rusch, partners, composing the firm of F. & A. Rusch; and also Ferdinand Rusch, John G. Escher, and Adolph Rusch, partners, composing the firm of Rusch, Escher & Rusch; and also Lewis Rosenfeld, Naftali K. Rosenfeld, and Isaac Rosenfeld, partners, composing the firm of L. Rosenfeld & Brothers; and also Frederick A. Spies, George Christ, and Edward Christ, partners, composing the firm of Spies, Christ & Company; and also Frederick A. Spies, George Christ, and Louis Jay, partners, composing the firm of Spies, Christ & Jay; and also Ferdinand Schuchardt, John M. C. Frolich, Henry Holthausen, Frederick Schuchardt and Frederick C. Gebhardt, partners, composing the firm of Schuchardt, Frolich & Holthausen; and also John W. Schulten & Chauncey D. Hurd, partners, composing the firm of J. W.
115 Schulten & Hurd; and also J. Steiner, J. P. Steiner, and Rich-
ard Roe, partners, composing the firm of J. & J. P. Steiner & Company; and also Adolphus Schniewind and John Doe, partners, composing the firm of Schniewind & Company; and also Albert B. Strange and Edward B. Strange, partners, composing the firm of Strange Brothers; and also Edward B. Strange and Albert B. Strange, partners, composing the firm of E. B. Strange & Brother; and also Simon Strahlheim and Arnold Friedman, partners, composing the firm of S. Strahlheim & Company; and also John Syz and Charles W. Funk, partners, composing the firm of J. Syz & Company; and also Augustus B. Theriott; and also John A. Ubsdell, Charles Peirson, and George G. Lake, partners, composing the firm of Ubsdell, Peirson & Lake; and also Charles Vyse, Thomas A. Vyse, junior, and John Reynalds, partners, composing the firm of Vyse & Sons; and also Charles Vyse and Thomas A. Vyse, junior, partners, com-

posing the firm of Vyse & Sons; and also Robert Waller; and also Edward Warburg and Julius Goetz, partners, composing the firm of Edward Warburg & Company; and also August Wetter; and also Oscar Zollikoffer and William Blank, partners, composing the firm of Zollikoffer & Blank, complainants,

vs.

116, 117 HEMAN J. REDFIELD, DEFENDANT.

To the Hon. Ward Hunt, Associate Justice Supreme Court United States:

The complainants respectfully represent that they are desirous to take an appeal from the decree of said circuit court in the above cause dismissing said bill of complaint to the Supreme Court of the United States. And they pray that your honor will sign the citation therefor, and will name the surety, and specify the penalty of the bond to be given on such appeal.

ALMON W. GRISWOLD,
Solicitor for the Complainants.

UNITED STATES OF AMERICA,
Northern District of New York, Second Circuit:

It is ordered that the above prayer for an appeal be allowed, and that the bond filed by the appellant in the clerk's office of the northern district of New York, in said court, in the penalty of five hundred dollars, with Almon W. Griswold and Augustus Heydenreich, the obligors and sureties therein, be and the same is approved of for that purpose.

September 30, 1875.

WARD HUNT,
Ass. Just. Sup. C't U. S.

118 (Indorsed:) U. S. circuit court, northern district of N. Y. Otto Andreae et al. vs. Heman Redfield. Petition of appeal and order allowing appeal. A. W. Griswold, solicitor for plaintiffs & appellants. Filed Oct. 4, 1875.

119 UNITED STATES OF AMERICA, *ss:*

To Heman J. Redfield, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be held at the Capitol in the city of Washington, on the second Monday of October next, pursuant to a petition of appeal filed in the clerk's office of the circuit court of the United States for the northern district of New York, in a certain action pending in the circuit court of the United States for the northern district of New York, wherein Otto Andreae and Bernhard Andreae, partners, composing the firm of Andreae & Company, and also the said Bernhard Andreae and Otto Andreae, the younger, partners, composing the firm of Andreae & Company; and also Aaron Arnold, Richard Arnold, James M. Constable, Joseph P. Barker, Clark L. Sharpstein, and Leonard Jacobs, partners, composing the firm of Arnold, Constable & Company; and also Benjamin Babcock and Van Zant M. Moore, partners, composing the firm of Babcock & Moore; and also Frederick Berly; and also Charles E. Borsdorff and Herman Winter, partners, composing the
firm of Borsdoff & Winter; and also Samson Boiceau and Fer-
120 dinand Rusch, partners, composing the firm of Boiceau & Rusch;
and also William Brunner, Samuel Brunner, and John J. Brunner, partners, composing the firm of William Brunner & Company; and also Lewis Curtis, Benjamin Curtis, and Henry A. Booream, partners, composing the firm of L. & B. Curtis & Company; and also Francis Cottenet and Henry L. Atherton, partners, composing the firm of F. Cottenet &

Company; and also Francis Cottenet and Henry L. Atherton, partners, composing the firm of Cottenet & Atherton; and also Charles F. Dambmann and Philip F. Pistor, partners, composing the firm of C. F. Dambmann & Company; and also Hippolyte DeGoer and Joseph Rifflard, partners, composing the firm of H. DeGoer & Rifflard; and also Alfred Edwards and Richard Roe, partners, composing the firm of Alfred Edwards & Company; and also John S. Gourd and Henry Gourd, partners, composing the firm of Gourd Frères; and also Henri Gourd and John S. Gourd, partners, composing the firm of Gourd Frères; and also Claudius Gignoux, Tileston Cushing, and Charles H. Christmas, partners, composing the firm of C. Gignoux & Company; and also Samuel Guillaume, Amadée Fargis, Anthony Magés, and Sebastian Dupons, partners, composing the firm of Guillaume, Fargis & Company; and also Samuel Guillaume, Amadée Fargis, and Anthony Magés, partners, composing the firm of Guillaume, Fargis & Company; and also Chauncey D. Hurd and John W. Schulten, partners, composing the firm of John W. Schulten & Hurd; and also Morris L. Hallowell and John Doe, partners, composing the firm of M. L. Hallowell & Company;
121 and also Henry Hennequin and Duncan McDugall, partners,
composing the firm of H. Hennequin & Company; and also Louis Heidenheimer, Sigmund Meyerheimer, and Adolph Mack, partners, composing the firm of L. Heidenheimer & Company; and also Adrian Iselin, Ernest Giraud, and Henry J. Barbey, partners, composing the firm of A. Iselin & Company; and also Adrian Iselin and Ernest Giraud, partners, composing the firm of A. Iselin & Company; and also David Lane and John Lamson, partners, composing the firm of Lane & Lamson; and also David Lane, John Lamson, and Alfred Woodbridge, partners, composing the firm of Lane, Lamson & Company; and also John Lehmaier and Martin H. Lehmaier, partners, composing the firm of Lehmaier Brothers; and also James S. Little, Paul Alden, and James M. Dunbar, partners, composing the firm of Little, Alden & Company; and also William Loeschigk, Otto Wesendonck, and Anthony Schafer, partners, composing the firm of Loeschigk, Wesendonck & Company; and also William Loeschigk, Otto Wesendonck, and Gustavus Kutter, partners, composing the firm of Loeschigk, Wesendonck & Company; and also William Loeschigk, Otto Wesendonck, Gustavus Kutter, and Edward Luckemeyer, partners, composing the firm of Loeschigk, Wesendonck & Company; and also Henry Lewis, junior, Joseph W. Lewis,
122 and Walter H. Lewis, partners, composing the firm of Lewis
Brothers; and also Leon Musey and Frederick Goltier, partners, composing the firm of Musey & Goltier; and also Theodore Passavant and Herman Passavant, partners, composing the firm of T. Passavant & Company; and also Charles Payen, L. Payen, and Augustus B. Theriott, partners, composing the firm of C. Payen & Company; and also Charles Payen and Augustus B. Theriott, partners, composing the firm of C. Payen & Company; and also Frederick M. Peyser; and also Ferdinand Rusch and Adolph Rusch, partners, composing the firm of F. & A. Rusch; and also Ferdinand Rusch, John G. Escher, and Adolph Rusch, partners, composing the firm of Rusch, Escher, & Rusch; and also Lewis Rosenfeld, Naftali K. Rosenfeld, and Isaac Rosenfeld, partners, composing the firm of L. Rosenfeld & Brothers; and also Frederick A. Spies, George Christ, and Edward Christ, partners, composing the firm of Spies, Christ & Company; and also Frederick A. Spies, George Christ, and Louis Jay, partners, composing the firm of Spies, Christ & Jay; and also Ferdinand Schuchardt, John M. C. Frolich, Henry Holthausen, Frederick Schuchardt, and Frederick C. Gebhardt, partners, composing the firm
123 of Schuchardt, Frolich & Holthausen; and also John W. Schulten,

Supreme Court of the United States.

OTTO ANDREAE, *et al.*,
Appellants,
vs.
HEMAN J. REDFIELD'S executors,
Respondents.

In Equity.

PLAINTIFF'S BRIEF.

Statement of Facts.

There are pending in the U. S. Circuit Court for the Northern District of New York, sixty actions, commenced May 10, 1864, by sundry merchants, against Heman J. Redfield, late Collector of Customs at the Port of New York, to recover excess of duty, paid by them, under protest, on freight, charges and commissions, between Nov. 1, 1853, and July 1, 1857.

To each of these actions, in violation, as the plaintiffs say, of an agreement not to do so, the defendant interposed the plea of the statute of limitations; and thereupon all those several plaintiffs in the aforesaid sixty suits at law, have united in this bill in equity, wherein they pray that the defendant, H. J. Redfield, may be forever enjoined and restrained from presenting or maintaining upon the trial of said sixty suits, of the plea of the statute of limitations, or that the statute of limitations is a bar thereto.

The bill sets forth, folios 6, 7, that the plaintiffs were importers, and, as such, imported into New York certain foreign merchandise, which was subject to ad valorem duty upon the actual market value thereof in the principal markets of the country whence imported, that the defendant added, or compelled the plaintiffs to add, to such value,

First.—Certain charges, assumed by the defendant, to be for expenses of transportation from such principal markets to the place of shipment, and

Second.—Commissions on such value, at the rate of two and a half per centum. And the defendant computed and compelled the plaintiffs to pay duty on such increased amounts, which they did under protest.

That the addition of said charges for expenses of transportation, and also the addition of commissions, above one and a half per cent., that being the usual rate on importations from Great Britain; and above two per cent., the usual rate on importations from the Continent of Europe, (except Paris) were erroneous and unlawful, under section 1, of the Act of March 3d, 1851, chap. 38, 9 stat. at L. page 629.

That the defendant, Redfield, persisted in making these unlawful exactions during the years 1853, 1854, 1855, 1856 and 1857, and the plaintiffs, in order to obtain possession of their goods, paid these exactions, under proper protests in writing.

These exactions had been decided to be illegal in exactly similar cases, in the U. S Circuit Court in the Southern District of New York, and in California, and one portion of them was admitted in 1856, to be illegal by Treasury Regulations No. 63, page

22. "See Schedule A, at folio 20 of record, which reads as follows:

"Freight or transportation from the foreign port of shipment to the port of importation is not a dutiable charge. In cases, therefore, of goods arriving in the United States after having been first transported from the place of their production or manufacture to another port or place, whether in the same or another country, by land or by water, and thence transhipped for the United States, provided, satisfactory evidence be adduced to the collector of the customs at the port where the said goods shall arrive that they were originally shipped with the *bona fide* intention of having them transported to a port in the United States as their final port of destination—no dutiable costs or charges will have accrued, either on the transportation from the first to the intermediate port, or while remaining in or leaving the latter, the voyage or transportion being regarded as continuous from the country whence originally exported in good faith, on a declared destination for a port and parties in the United States. In illustration of the rule thus established, it may be remarked that the evidence of final destination being satisfactory, no duties would be chargeable in ports of the United States, on the freight, or transportation, or charges in the intermediate ports, on goods originally from China or Glasgow, or Cardiff, or Londonderry to Liverpool; from Malaga to Valparaiso; from Dresden to Bremen; or from Basle to Havre, on the said goods being trans-shipped for the United States from the several intermediate ports enumerated.

And in October, 1856, upon plaintiffs application the department directed this excess of duty to be refunded. See letter of Secretary of Treasury, dated October 4, 1855. Schedule B, at folio 21, as follows:

"Treasury Department,
"October 4th, 1856.

"Sir.—On application being made to you by "Messrs. A. Iselin & Co., and others, of New York, "you are authorized and directed to cause to be "prepared the usual certified statements for return "of 'duty on freight,' in such cases where the "same has been found to have been paid in excess, "as decided by this Department in General Regulations, No. 63, page 22, and under written pro-"test, and transmit the same to this department "for its consideration.

"Very respectfully,
"Your obedient servant,
"JAMES GUTHRIE,
"*Sec'y of Treasury.*

"H. J. Redfield, Esq.,
"*Collector of Customs,*
"New York."

And the exaction of duty on commissions above the usual rates was admitted to be illegal, and ordered to be refunded in May, 1857. See letter of Secretary of Treasury, dated May 27th, 1857. Schedule C, folio 21, as follows:

"Treasury Department,
"May 27th, 1857.

"Sir.—I am in receipt of your letter of the 26th "inst., transmitting a report of the U. S. Ap-"praisers, in relation to the 'usual commissions' "charged in China, Sweden, Norway, Holland and "German ports, and have to state, in reply, that "you will cause to be prepared and transmitted to "this department, the usual certified statements "for a return of the duty exacted in error in all "cases where it is found that the said duty has "been on a rate of commission greater than the "usual rate chargeable in the above named "countries.

"Very respectfully,
"HOWELL COBB,
"*Sec'y of Treasury.*

"H. J. Redfield,
"*Collector of Customs.*
"New York."

See also Treasury Instructions, dated May 21st, 1863. Schedule D, folio 22, as follows:

"Additional Instructions,

"Treasury Department,
"May 21st, 1863.

"Collectors and others are informed that this "department concurs in the decisions of the Courts, "that charges for transportation of goods from the "interior of the country by railroad or water carriage, incurred prior to the time of exportation, "cannot be added to the value of the goods, for "the purpose of establishing their dutiable value.

"All costs and charges incidental to the shipment, such as port charges, drayage, commissions, export duty, etc., except marine insurance, "should be added to the value of any goods, wares, "or merchandise in the principal markets to fix "their dutiable value.

"The usual or legal rate of commissions on "merchandise from Great Britian has been decided "in the U. S. Circuit Court at New York, (Bredt. "*et al.*, vs. Schell, collector) to be 1½ per centum, "and that of commissions on merchandise from "continental Europe, except Paris (see same case) "to be 2 per centum. In this decision the department also concurs.

S. P. CHASE,
Secretary of Treasury."

These instructions of February 1st, and October 4th, '56, and May 27, 1857, in the practice of the Treasury Department, determined the plaintiffs' rights to the return of the excessive duties, so paid by these plaintiffs severally.

Upon these instructions being given to refund these duties, a large number of similar claims were presented in 1856, 7–8 and 9, to the proper officer at the Custom House, to be adjusted, certified, and transmitted to the Secretary of the Treasury for payment, and they were paid, and the work of adjusting and refunding under these instructions went on regularly and without intermission, till after Mr. Agustus Schell took office as collector of customs, on July 1st, 1857, when for some reason he refused to go on with, or to allow the adjustment to proceed, and the work was practically suspended for many months.

In the meantine the plaintiffs brought the matter to the attention of Mr. Cobb, the Secretary of the Treasury, with the request that Mr. Schell be directed to resume the adjustment and certification of these claims pursuant to instructions.

The secretary expressed the willingness of the government to carry out in good faith, the instructions given in the circulars of October 4th, 1856, and May 27th, 1857, and on May 21st, 1858, addressed a letter to Mr. Schell, the collector, of which a copy, schedule E, folio 23, is as follows:

"TREASURY DEPARTMENT,
"May 21st, 1858."

"SIR,—I would call your attention to the in-
"structions of this department, dated October 4th,
"1856, wherein authority is given to prepare and
"transmit the usual certified statements for return
"of duty on "sea freight," paid under written
"protest. As the parties who represent several of
"the claims have made complaint of the delay at-
"tending the preparing of the same in your office,

"you are requested to have the above instructions
"complied with at your earliest convenience.

"I am Respectfully,

"HOWELL COBB,

"*Secretary of Treasury.*"

"AGUSTUS SCHELL,

"*Collector, New York.*"

Mr. Schell continued to neglect and hinder the adjustment of these claims, upon various pretexts, for more than a year. After several interviews between the plaintiff's attorney and Mr. Ogden, the Auditor at the Custom House, under whose direction and supervision the work of adjustment and refunding duties overpaid, was carried on, it was concluded that Mr. Schell would certainly recede from his position and ultimately obey the Secretary's instructions and resume the adjustment and payment of these claims.

But after waiting several months without any evidence of an intention on Mr. Schells part to do so, and some time in the summer of 1859, the question of the statute of limitation arose, at an interview between plaintiff's attorney and Mr. Ogden, the auditor. The attorney of the plaintiffs in these cases informed Mr. Ogden that the statute would begin to run on Nov. 1st, 1859, and he supposed it would be necessary to commence suits at that time in all these cases (several hundreds) to prevent that statute becoming a bar.

Mr. Ogden replied that the Treasury Department having acquiesced in the decisions of the Courts, and given instructions to refund the money in these cases, it was not the fault of the Treasury Department that it was not done. The Secretary had, by his letter of May 21st, 1858, peremptorily ordered the collector to do it, and all that was necessary for the merchants to do to prevent the statute of limitation from running, was to present their claims in each case to the Refunding Clerk, in the Auditor's Office, for adjustment. That upon such presentation, by the rules and practice of the Treasury Department, the statute ceased to run.

Mr. Ogden further remarked that "if, under the circumstances, the merchants—these plaintiffs—should commence suits for the recovery of these duties, which the secretary had already ordered to be refunded, it would justify the department in the belief that it was done for the purpose of accumulating bills of costs, and must necessarily annoy and unfavorably prejudice the department against these plaintiffs and their claims. It was not *necessary* to commence suits to prevent the statute from running, but only to present their claims. That the department was willing to refund, but its agent, Collector Schell, was temporarily disregarding its instructions, but must ultimately obey them and resume the adjustment of these claims, and all would be well.

Some time after this, and about September, 1859, plaintiff's counsel had one or two interviews with Mr. Redfield, the defendant, in New York, and introduced the subject of Mr. Schell's refusing or neglecting to adjust these cases, pursuant to instructions, and referred to the question of the statute of limitations, and stated to him what the auditor, Mr. Ogden, had said on the subject. Mr. Redfield replied that he no longer had any control over the adjustment of these claims; that as far as he was concerned, Mr. Ogden had the whole charge of the matter; that from his long experience he must be familiar with the practice of the department, and plaintiff's attorney could rely on the accuracy of Mr. Ogden's statement; and at Mr. Redfield's request, the plaintiff's attorney met him at the auditor's office in the Custom House, when the question was talked over between Mr. Ogden, Mr. Redfield, and the plaintiff's attorney, as it had been previously between the latter and Mr. Ogden.

Mr. Ogden explained to Mr. Redfield, as he had before, to plaintiff's attorney, that according to the practice of the department, if plaintiffs had already presented their claims for refund, or if they would do so, the statutes ceased to run from the date of such presentation, as effectively as if suit was commenced, and corroborated his assertion by referring Mr. Redfield to decisions of the department to that effect.

(See letter of Secretary of Treasury, dated May 20, 1854, also letters of H. J. Redfield, dated October 11, 1854, and November 13, 1854, and also secretary Guthrie's reply, dated November 16, 1854.) Marked A1, A2, A3, and A4, at end of this brief.

And at the same time referred to the probability of Mr. Schell being persuaded to resume the adjustment of these cases.

Mr Redfield replied that in view of all the facts he could see no necessity for sueing these cases; that if the plaintiffs had presented or would present their claims for adjustment at the Custom House, the statute ceased to run from that time, and it could not and would not be interposed as a defence to the payment of them, and he concurred with Mr. Ogden in the opinion that Mr. Schell would soon resume the adjustment of them, adding that, of course, these claims will all be paid.

Plaintiff's attorney, not wishing to multiply suits, and only desiring to preserve the legal rights of his clients, and having presented all these claims to the Refunding Clerk in the Auditor's Office, (see copy of affidavit of James T. Griswold, fols. 37-38). He went to Washington and had an interview with Mr. Cobb, the Secretary of the Treasury, in the latter part of 1859, and made known to him the situation of these claims, and the representations of Mr. Ogden, the auditor, and Mr. Redfield, collector, the defendant, in respect to the statute of limitations, and desired to know if the claimants could rely on these representations that suits need not be commenced to prevent the statute from running, provided they had presented their claims at the Custom House for adjustment in proper time; and the secretary, after consultation with the clerk at the head of the Custom Bureau, replied that such had been the practice for many years, and that latterly the department, with a view of discouraging a multiplicity of suits, had become even more liberal in its practice, and referred said attorney to the decision in the case of Sawyer *vs.* Collector of Boston, as shown in the letters of May 18th, 20th, and 27th, 1858, copies of which are in Schedules F, G, and H, (folios 23-24,) and are as follows:

"F." (folio 23.)

"TREASURY DEPARTMENT,
"May 18th, 1858.

"SIR.—In the certified statements of claims of J. "Sawyer, S. A. Way, and S. L. Wiggins & Co., "for return of excess paid on storage, it would ap- "pear, from a portion of the dates of importations, "that they are debarred by the statute of limita- "tions of your State.

"The department, therefore, before taking any "action upon them, will require the further in- "formation as to the fact, and also the various "dates when the payments of the storage were "made.

"I am respectfully,
"HOWELL COBB,
"*Secretary of the Treasury.*

"A. W. AUSTIN,
"*Collector,*
"Boston."

"G."

"Custom House, Boston,
"Collector's Office, May 20th, 1858.

"Sir.—I am in receipt of your letter of the 18th "inst., requesting information in respect to the "claims of James Sawyer, Samuel A. Way, and J. "L. Wiggins, for storage exacted in excess, portions of which, from the dates of importations "given, appear to be barred by the statute of limitations of this State.

"By the Revised Statutes of Massachusetts, "chap. 120, sec. 1, all actions of assumpsit, "or upon the case, founded on any contract or liability, express or implied, are required to be commenced within six years next after the cause of "action shall accrue, and not afterwards.

"The action of Foster, *et al.*, *vs.* Peaslee, on the "judgment in which this class of claims is allowed, "was commenced in the May Term of the Circuit "Court, 1856. The law was argued at the October "Term, and decided by the Court against the collector. At the May Term, 1857, judgment was "entered, and the decision acquiesced in by the "department, under date of June 16th, 1857.

"It has been the practice in claims of this description, where a single case was tried to determine the law, to extend to all the claimants under the decision, the advantage in respect to limitation acquired by the party bringing the suit, "provided their claims were equally valid in other "particulars.

Thus, in the cases in question, I deemed it proper to include in the statements all claims which accrued within a period of six years prior to May, 1856, when the action of Foster was commenced. This rule was adopted to prevent a multiplicity of suits for the same cause, which would otherwise be likely to be brought, and so to save expense to the United States.

Under this rule none of the items embraced in the statements referred to in your letter, are barred. Assuming, however, that claims which accrued six years or more prior to June 16th, 1857, the date of the departments' acquiescence in the decision of the Court, are cut off by this statute, then the item of $3 in the statement, in favor of J. Sawyer, is not allowable; the same having been paid on the 3rd of April, 1851. In the other cases, an examination of the dates of payments as appearing on the records of this office, shows that the several claims were made within the time limited by law.

A memorandum of those dates in all instances, involving doubt, is enclosed.

Very respectfully, your obdt. servt,
ARTHUR W. AUSTIN,
Collector.

Hon. Howell Cobb,
Sec'y of the Treasury,
Washington.

"H."

"Treasury Department,
"May 17th, 1858.

"Sir,—Your report, relative to the claims of "James Sawyer and others for return of excess, "paid on storage is received, and the department "having concurred therein, you are informed that "all cases of a similar nature must only include "statements * * * *

"I am, respectfully,
"HOWELL COBB,
"*Secretary of the Treasury.*

"A. W. Austin,
"*Collector,*
"Boston."

The secretary remarked that under this latter ruling of the department, the statute *had already ceased to run against these claims*, and the plaintiff's attorney could assure his clients that it was wholly unnecessary to commence suits; the department having acquiesced in the decision of the Courts and given instructions to refund, and he trusted Mr. Schell would soon find time to carry these instructions into effect. The plaintiffs relying on these representations refrained from bringing their actions for a long time thereafter. (folio 12.)

During the period from 1859, to May, 1864, hundreds of charges and commissions, claims presented in like manner, and in all respects like the plaintiff's claims were adjusted and paid pursuant to this practice, so that on May 10, 1864, there remained unadjusted and unpaid the claims of the several plaintiffs in this suit, being sixty in number and none of which have been paid, except partial payments made in some cases. That in pursuance of the plan then in practice and favored by the Treasury Department, of bringing suit and then referring the case to the clerk of the Court for examination and adjustment, and in consequence of the delay in the Custom House, in making the adjustments of these cases, suits were commenced on all the remaining claims, sixty in number, by the plaintiffs, in the State Courts, and no appearance *being* made for the defendant within twenty days, the time prescribed by law for that purpose, he was in default, and plaintiffs could have taken judgment against him upon such default, but did not. (folio 13).

The defendant having been served with process in these sixty cases, at his residence in Batavia, in the northern district of New York, when upon defendants motion they were removed from the State Court, by certiorari, to the Circuit court, they of necessity went into the Northern District of N. Y.

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That upon said actions being removed to the U. S. Circuit Court, the plaintffs declared in *assumpsit* on the common money counts, and insimul computassent count, for the money so paid in excess of duty, and the defendant after many delays, on the 17th day of Nov. 1866, two years and a half after suits were commenced, filed his plea, by which he pleaded.

1. The general issue.
2. Payment ; and.
3. The statute of limitations of six years.

The plainiiffs requested the defendants to withdraw the plea of statute of limitations, but his attorney refused to do so. (folio 15.)

The plaintiffs then having first obtained leave of Court, put in several replications to said plea of the statute of limitations, copies of which pleas and replications are marked Schedule K, folio 27-31. To these replications the defendant interposed a demurrer. See Schedule L, folio 31-33.

This demurrer was brought on to be heard before Judge Woodruff, in the U. S. Circuit Court, for the Northern District of New York, who subsequently in the latter part of March, 1872, gave judgment on the demurrer, by which he sustained the first and second replications, and held the third and fourth insufficient.

See Judge Woodruffs remarks, folio 15-16, Record.

The defendant took an issue of fact on the first and second replications, and the actions now stand on issues of fact, with a judgment on a demurrer against the plaintiffs on the third and fourth replications.

And while the plaintiffs have good and substantial causes of action in the said sixty suits upon claims recognized by the Treasury Department to be just and legal, they are exposed to be defeated at common law, unless relieved by this Court by the interposition of its equity powers in restraint of the defendant on such pleas of the statute of limitations.

The plaintiffs further show that they have acted together in all the proceedings aforesaid, and by the same attorney, and the said Redfield, defendant, in all said sixty actions by the same counsel, and all notices, orders, and consents in said sixty suits, including the replications and demurrers and printed briefs, &c., have been joint, bearing the title of all the suits, &c., against the same defendant, &c.

And the plaintiffs are advised that in seeking the equity relief, prayed for within—they properly unite in this bill rather than file sixty several bills for the same relief.

And as the plaintiffs are entirely remediless in the premises, according to the strict rules of the common law, and can only have relief in a Court of Equity, they pray that the said Heman J. Redfield may, without oath, full, true, direct and perfect answer make to all and singular the matters herein stated and charged, and that he show, if he can, why the plaintiffs should not have the relief prayed for, and that it may be decreed that the defendant, Heman J. Redfield, is barred in equity, as having stipulated and agreed not to plead the statute of limitations. (folio 18.)

That he may be required to stipulate and agree in writing to waive the defence of the statute of limitations in all said litigations, and that he may be required to retract and withdraw his said pleas of the statute of limitations in all said cases.

And that the defendant, Heman J. Redfield, may be enjoined and restrained pending this action, and forever afterwards from prosecuting or maintaining upon the trial of any of said sixty actions, of the plea of the statute of limitations, and that writs of injunctions may issue out of this Court, directed to the said Heman J. Redfield and his agents and attorneys, restraining him and them, and also a subpœna, directed to the said Heman J. Redfield, commanding him to appear before the U. S. Circuit Court, on a certain day, to answer to all and singular the premises, &c. (folio 19.)

The bill was served on the defendant, Redfield, and filed March 11, 1874.

On March 16, 1874, the parties entered into the following stipulation:

" It is hereby stipulated that the hearing on the " motion for an injunction on the bill in equity, " between Otto Andreæ, *et als.*, plaintiffs, and Heman J. Redfield, defendant, noticed for the 19th " inst. at Utica, be postponed, to be brought on by " the plaintiffs for a hearing on four days notice, " before the Hon. L. B. Woodruff, or some Judge " of the U. S. Court, to be designated by him, to " hear the same at his Chambers, or elsewhere in " the city of New York."

Dated New York, March 16, 1874.

Signed, ALMON W. GRISWOLD.,
Solicitor for Plaintiffs.
WEBSTER & CRAIG,
Solicitor for Defendant.

On April 1st, 1874, the defendant demurred to the plaintiff's bill of complaint, see folios 39-42 of record, as follows:

"39, 40. Circuit Court of the United States
" for the Northern District of New York.
" March Term, 1874. In Equity."

' The demurrer of Heman J. Redfield, defend- " ant, to the bill of complaint of Otto Andreae and " others, complainants.

"This defendant, by protestation, not confessing "or acknowledging all or any of the matters and "things in the said complainants' bill to be true, "in such manner and form as the same are therein "set forth and alleged, demurs thereto, and for 'cause of demurrer shows:

"That the said complainants have not, in and "by their said bill, made or stated such a case as "does or ought to entitle them to any such discovery or relief as is thereby sought and prayed "for, from or against this defendant.

"Wherefore, this defendant demands the judgment of this honorable Court, whether he shall "be compelled to make any further or other answer to the said bill, or any of the matters and "things therein contained, and prays to be hence "dismissed, with his reasonable costs in this behalf sustained.

WEBSTER & CRAIG,
Solicitors for Defendant.
SIDNEY WEBSTER,
Of Counsel."

Pursuant to the stipulation of counsel, of March 16, 1874, the following notice of hearing was served upon defendant's solicitor:

"You will please take notice that in pursuance "of a stipulation signed by the attorneys for the "respective parties, and dated March 16, 1874, *the* "*hearing on the motion for an injunction in the* "*bill in equity* in the above entitled cause, will be "brought on by the plaintiffs, before the Hon. D. "A. Smally, &c., &c., on the 23d day of April, 1874, "at 11 o'clock, at the Chambers of U. S. Circuit "Court, Chambers St.

Dated April 18th, 1874.

(Signed), ALMON W. GRISWOLD.

To Messrs. Webster & Craig,
Defendant's Solicitors, &c.

Pursuant to this notice, the hearing on the motion for an injunction, so prayed for in the complainant's bill, came on for hearing before the Hon. David A. Smally, on the 23d of April, which hearing was continued from day to day till April 30, 1874, and after a full and protracted hearing and arguments of counsel, the Court granted the injunction prayed for, and the following order was thereupon made by the Court. (See folios 47, 48, record.)

OTTO ANDREAE, *et al.*,
vs.
HEMAN J. REDFIELD.

"After hearing the motion for an injunction in "this case upon the bill filed herein March 17, "1874, and the arguments of counsel for the respective parties, and due deliberation had, it is ordered and adjudged by the Court that the defendant and his attorneys and solicitors be "strictly enjoined from proceeding and insisting "upon the trial of any of said sixty suits in a "Court of law, upon the pleas of the statute of "limitations, until the further order of the Court, "on condition that the plaintiffs in each of the "aforesaid sixty suits named in the bill, file a "stipulation with the Clerk of this Court, that in "case they recover judgment against the defendant therein, a certificate of probable cause shall "be issued by the Court rendering the judgment: "and further, that neither of the plaintiffs shall in "any event issue execution, or enforce said judgment in any way against said Redfield or his "property.

"Dated New York, April 30th, 1874.

"D. A. SMALLY, *Judge.*" (folio 47.)

In pursuance of the provision contained in the order made by Judge Smally, that the plaintiffs in each of the said sixty suits named in the bill shall file a stipulation with the Clerk of this Court, that certificates of probable cause should be issued by the Court rendering the judgment, the following stipulation was filed April 30th, 1874, folios 51, 52:

> "It is hereby stipulated and agreed that in case "the plaintiffs in any of the above entitled actions "shall recover action against the defendant, Heman "J. Redfield, that a certificate of probable cause "shall be issued by the Court rendering the judg-"ment; and it is hereby further stipulated that "the plaintiffs in neither of the said cases shall in "any event issue execution or enforce said judg-"ments, in any way, against the said Redfield, or "his property.
>
> "Dated New York, April 30, 1874.
>
> (Signed), ALMON W. GRISWOLD,
> *Attorney for Plaintiffs in each of the foregoing causes.*" (folio 52.)

The injunction was continued by Mr. Justice Hunt, at the June Term of the Court, at Canandaigua, 1874. See order of June 17, '74.

The hearing upon the demurrer finally came on before Judge Woodruff, on the second Tuesday of October, 1874, and he filed his opinion March 16, 1875, sustaining the demurrer, and dismissing the bill. See folio 50—67 of record.

The full opinion of the Court will be found at pages 28—38 of the record.

From this decree the complainants appealed to this Court.

Assignment of Errors.

The appellants herein assign as error, the ruling by which the Court below sustained the defendants' demurrer, and dismissed the plaintiff's bill.

First Point.

This suit is brought against the defendant, Herman J. Redfield, as Collector of Customs for the Port of New York, as the ministerial officer of the Government of the United States, designated by statute to be sued, for the purpose of trying the legality and validity of the exactions for duties alleged by the plaintiffs to have been overpaid. But so long as he obeyed the instructions of the Secretary of the Treasury, no pecuniary interest or personal liability attaches to him as such defendant.

Previous to 1839, suits had been commenced against the Collector of Customs, for acts similar to those for which these suits are brought, not because such suits were authorized by any act of Congress, for no such act was in existence up to that time, but because of the doctrine of the common law, "that if a man by fraud or wrong or il-"legality obtains, or exacts, or retains money justly "belonging to another, with notice that the latter "contests the rights of the former to receive, or ex-"act, or retain it, an action for money had and re-"ceived, lies to recover it back."

These suits were brought against the Collector of Customs, because neither the U. S. Government or the Secretary of the Treasury, the financial officer of the Government, could be sued; nevertheless, these suits were defended in every case by the U. S. District Attorney, or by special counsel, employed by and at the expense of the Government, and upon a determination against the collectors, the amount of the illegal exactions was ascertained by the officers of the Government, under the rules established by the Courts, and the amounts certified to the Secretary of the Treasury, by collectors, and paid out of the Treasury.

On the 2d day of March, 1839, Congress passed an act, which the Supreme Court of the United

States held in the case of *Cary* vs. *Curtis*, 3 *Howard* 237, took away this common law right of action, and decided that no action could be maintained against a Collector of Customs to recover back money illegally extracted for duties, on the ground (among others) that as the Collector, since the statute, had neither power to retain nor refund, there could as between him and the plaintiff arise *no privity nor implication on which to found the promise raised by the law*, only when an obligation to undertake or promise exists; and that, therefore, the action for money had and received could not in this case be maintained, but was barred by the Act of Congress of 1839.

See 5 Stat. at Large, 348.
Cary *v.* Curtis, 3 How., 236.

Between the 2d day of March, 1839, and the 26th day of February, 1845, no action could be had against the Collector of Customs to recover back moneys illegally exacted for duties, but parties who had overpaid duties were left to the tender mercies of the Secretary of the Treasury; thereby adding to his other duties that of supreme arbiter over all questions that might arise under the revenue laws.

On the 26th day of February, 1845, Congress passed another act, relieving the secretary of a portion of his responsibility, and restored to the Courts some part of their jurisdiction, so far, and so far only, as to "*try the legality and validity of such demand and payment of duties according to the due course of law.*"

Sec. 5, Stat. at L., 727.

In order to a correct understanding of the law as it now stands, and the relation which these two acts sustain to each other, let us (leaving out a little useless verbiage) put these two sections together. The 2d section of the act of 1839 reads as follows:

"All moneys paid to any collector of the

"customs for unascertained duties, or for duties
"paid under protest, against the rate or amount of
"duties charged, shall be placed to the credit of
"the Treasurer of the United States, kept and dis-
"posed of as all other money paid for duties is re-
"quired by law, or by regulation of the Treasury
"Department, to be placed to the credit of said
"treasurer, kept and disposed of; and shall not be
"held by the said collector to await any ascertain-
"ment of duties, or the result of any litigation in
"relation to the rate or amount of duty legally
"chargeable and collectable in any case where
"money is so paid, but whenever it shall be shown
"to the satisfaction of the Secretary of the Treas-
"ury, that in any case of unascertained duties, or
"duties paid under protest, more money has been
"paid to the collector than the law requires shall
"have been paid, it shall be his duty to refund the
"same out of the treasury. (5 Stat. at L. 348).

"Section 1, of the Act of 1845, provides that
"nothing contained in the above section shall take
"away, or be construed to take away or impair
"the right of any person who has paid, or shall
"hereafter pay money, as and for duties under
"protest in writing, signed by the claimant, at or
"before the payment of duties, setting forth dis-
"tinctly and specifically the grounds of objection
"to the payment thereof, to any collector of the
"customs in order to obtain goods, wares and mer-
"chandise imported by him, which duties are not
"authorized or payable in part or in whole by law,
"to maintain an action at law against such collect-
"or *to ascertain and try the legality and validity*
"*of such demand and payment of duties, and to*
"*have a right to a trial by jury touching the same*
"*according to the due course of law.*" 5 Stat. at
L. 727.

Now, it will be perceived, that all the provisions of the Act of 1839, under which the common law right of action was abolished, as per decision in case of *Cary* vs. *Curtis*, 3 *Howard*, **236**, are retained intact, and that the only change that was wrought in this Act by that of 1845, is this: *that for the purpose of ascertaining and trying the legality and validity of such demand and payment of duties, a suit may be maintained against the collector, and also requiring the protest to be in writing.*

The Courts are confined in their jurisdiction under this statute to the construction of the revenue laws, under which the demand and payment of duty is made. Is the demand by the collector under instructions of the Secretary of the Treasury of the particular duties protested against legal and valid? Is the interpretation, which the collector has put upon the law and order which he has made these exactions, the true ones? These are the questions and the only ones this Court are empowered to ascertain under this statute, and these questions having been found in favor of the claimants and the Secretary of the Treasury is *satisfied*, he is to refund the overpaid duty out of the Treasury.

Under the common law right of action, a suit could be brought against any one, be he a collector or a private person, who had received and retained money illegally and unjustly belonging to another, and it was under the rules and practice governing such action, prior to the Act of 1839, that the defendant was held personally responsible. But the action given by the Act of 1845 is only to be maintained against a Collector of Customs, or persons acting as such, and only for a specific purpose, and the only issue that can be tried under that statute is the one authized by that act; for it must be borne in mind that without this statute no suit whatever could be maintained against a collector, and as this action was created by statute for a certain purpose, Courts cannot go beyond the statute and assert an authority with which they are not invested.

Now, if there is any authority given by that Act of 1845 to the Court to try the question of the personal liability of the collector, or the statute of limitations, we have failed to see it.

Certainly, if the United States Courts are dependant upon the authority conferred by this act, for their jurisdiction in these actions against collectors, their powers are quite circumscribed, for they have by this statute no power except such as may be necessary to "*try the legality and validity of such demand and payment of duties according to the due course of law*," and we cannot go beyond the letter of the statute, for the Courts are dependent entirely upon the action of Congress, who possess the sole power of creating these tribunals for the exercise of judicial power, and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to them may seem proper. It follows then, that the Courts created by statute must look to the statue as the warrant for their authority. Certainly they cannot go beyond the statute, and assert an authority with which they may not be invested, or which may be clearly denied to them. The Courts of the United States are all limited in their nature and constitution, and have not the powers inherent in Courts existing by prescription, or by the common laws.

"In devising a system for imposing and collecting the public revenue, it was competent for Congress to designate the officer of the Government in whom the rights of that Government should be represented in any conflict which might arise and to prescribe the manner of trial, it is not to be imagined that, by so doing, Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights or that any personal responsibility to such citizen is thereby incurred

Congress has authorized a suit against the collector for certain purposes, but it has nowhere, either positively or by implication, made him liable in the suit, or authorized a judgment that may be enforced against him.

Decey on Parties, page 228, says that the rule that no persons can be sued for a breach of contract who is not a party to the contract has two exceptions :

1st.—Actions against a person *appointed by statute to be sued* in behalf of others.

2d.—Action on some contract implied by law, or action *quasi ex-contractu.*

The case at bar belongs to the first exception, and no suit could be maintained against the Collector of Customs for contracts avowedly entered into by him in his official capacity, except he had been appointed by statute of 1845, to be sued.

1 Chitty pleading 37 to 39.
Hopkins *v.* Mohaffey 11 S. & R. 128.
Carew *v.* Otis 1 J. R., 418.
2 Binn. 201.
9 Mass., 335.

This statute has not given the party a right to recover against him ; indeed a fair construction of this statute is, that Congress has appointed the Collectors of Customs, as the officer of the government, in whom the rights of that government should be represented in any legal conflict which might arise growing out of the revenue laws, and to prescribe the manner of trial, and as soon as the Courts shall determine the illegality and invalidity of such demand and exactions, it is the duty of the Secretary of the Treasury, to draw his warrant upon the treasurer, in favor of the person entitled to the over-payment, directing the said treasurer to refund the same out of any money in the treasury not otherwise appropriated.

This Act further limits the right of action against the collector, to such payments *as are made under protest.* It will also be borne in mind that previous to the Act of 1839 and 1845, there was no Statute requiring the Secretary of the Treasury to refund the illegal exactions out of the treasury.

The Statute of 1845, authorizing these suits against the collector, limiting the issue to be tried to the simple question of the "*legality and validity of such demand and payment of duties.*" It follows, that no other issue can be entertained by the Court, and, therefore, the statute of limitations cannot be pleaded by the collector.

If any doubt existed, as to whether any pecuniary liability attached to the defendant as collector, it was removed by the Act of March 3, 1863, § 12, which provides: "That where a recovery shall be "had in any such suit (against a collector) or pro-"ceedings, and the Court shall certify that there "was probable cause for the act done by the col-"lector or other officer, or that he acted under the "directions of the Secretary of the Treasury, or "other proper officer of the government, *no* execu-"tion shall issue against such collector or other "officer, but the amount so recovered, shall, upon "final judgment, be provided for and paid out of "the proper appropriation from the treasury." See Act 1863, Ch. 76, § 12.

12 Stat. at L., 741.
§ 989, Revised St. of U. S.

Under this law no execution can issue upon any judgment against the defendant, where he has simply obeyed the secretary's instructions.

See opinion (manuscript) of Judge Blatchford, in Cox *vs.* Barney, and Lachaise, *et al.*, *vs.* Redfield.

Judgments had been rendered in these cases against the defendants, ex-collectors of customs, for duties overpaid. After a long delay, the Secretary of the Treasury having neglected to pay these judgments, the plaintiffs issued executions against the defendants; whereupon, the U. S. District Attorney moved the Court to certify, that there was probable cause for the acts done by the defendants under § 989 of the Revised Statutes of the U. S., and that the executions, which had been is sued, be stayed by the Court.

BLATCHFORD, *J.*, in deciding this motion on September 8, 1877, says:

"I think that the proper construction of section 989 of the Revised Statutes is, that the amount of the recovery cannot be paid out of the treasury, unless there is such a certificate as the section provides for. If a recovery is had, and Court makes a certificate of probable cause, or that the collector acted under the direction of the proper officer, * * * * the Secretary of the Treasury—and he exacts money as a public officer, and then places that money in the Treasury of the United States, his property shall be absolved from liability to respond for the exaction. He takes the office of collector under those circumstances. The person paying the exaction deals with the government and with the collector, under those circumstances, and with the full understanding, that if the money is exacted and is then paid into the treasury, and the Court shall certify that the collector acted under the direction of the Secretary, he shall not have any remedy against the property of the Collector. *It is manifest that the Government reinstated the right of action against the Collector for the purpose of giving to the party from whom the illegal duties should be exacted, a standing in Court to sue the Collector, while it took away from him the right to obtain the fruits of his judgment by execution.*

In acting upon this statute, either in granting a certificate, or in restraining an execution, the Court cannot look into the question, whether the reasons for not paying the money out of the Treasury appear to be sufficient, as to whether there is a fund out of which it might be paid, or as to whether the Secretary of the Treasury ought to have paid it.

It is said that it is discretionary with the Court to give a certificate of probable cause. It seems to me, however, that where the Collector has exacted money in the performance of his official duty, under the directions of the Secretary of the Treasury, and has paid it into the Treasury, it is the duty of the Court to grant a certificate to that effect, leaving the consequences to take care of themselves. * * * *

The statute looks to the exemption of the property of the Collector from execution, provided he has acted under the instructions of his superior officers, and has paid into the Treasury of the United States the money which he has exacted. The ultimate means of paying back the money is another question.

The statute says that it shall be provided for and paid out of the proper appropriation from the Treasury.

In reference to the cases in which executions have been issued, it seems to me that the good sense of the statute is, that no execution shall collect the debt, but the money shall be paid out of the Treasury. Therefore the certificate is to be granted, not only to prevent the issuing of an execution against the Collector, but to stay one already issued."

The 13th section of this same act of 1863, provides, *That in all suits or proceedings against Collectors, or other officers of the revenue, for any act done by them, or for the recovery of any money exacted by, or paid to such officers, which shall have been paid into the Treasury of the United States, it shall be the duty of the respective District Attorneys within the districts where such suit* *or proceedings shall be had, unless otherwise instructed by the Secretary of the Treasury, to appear on behalf of such officers.* * * *

Thus showing that it was the intention of Congress to throw upon the United States the entire control and responsibility of defending actions against Collectors of Customs, and to relieve such Collectors from all responsibility, and all participation or concern in the management or trial of such case. In a word, showing that Collectors are nominal defendants, made so by statute, but with no personal concern, interest, or responsibility in the cases which are defended by the United States, in the names of such Collectors, but for the sole benefit of the former.

Sec. 12, Stat. at L., 741, § 13.

Second Point.

The Statute of Limitations is a personal one, and can only be pleaded by the party personally chargeable with the payment of the debt.

If the Acts of March, 1839, February, 1845, and March, 1863, deprived the collector of all interest and relieved him of all personal liability, and cast it upon the United States, so that the latter became, and was, the real debtor and the real defendant, it follows that he is not the *party to be charged*, and he *cannot remove or set up that bar.*

By the 110th section of the Code of the State of New York it is provided that, "no acknowledgment or promise shall be sufficient evidence of a " new or continuing contract, whereby to take the " case out of the operation of this title, (statute " bar of six years) unless the same be contained in " some writing, *signed by the party to be charged* " *thereby*, &c., N. Y. Code, 1864. § 110.

This language is almost identical with that of the English statute, which is, that no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, "unless such acknowledgment or promise "shall be made or contained in some *writing, to be* "*signed by the party chargeable thereby.*" In consequence of these *last words*, it has been decided that, an acknowledgment signed by an agent in *behalf of the debtor*, is not sufficient.

Hyde *vs.* Johnson, 2 Bing., N. C. 777.
3 Scott, 289, S. C.

"Looking," says the Chief Justice, in Hyde *vs.* Johnson, "at the words of the statute, it is confined in terms to a writing, signed by the party chargeable thereby, and as the effect of that statute is for the first time to introduce a legislative exception in the statute, and thereby *pro tanto* to repeal it, we do not feel ourselves justified in extending such exceptions beyond the plain and unambiguous meaning of the words employed therein. The Legislature has in many cases given equal efficacy to written instruments when signed by the party, and when signed by their agent, but in all those cases express words have been employed for that purpose."

This Statute of Limitations was made for the benefit of the *debtor or his estate*, and not for strangers in interest.

Now, if the rule requires the acknowledgment of a debt, in writing, to be signed by the party *to be charged*, in order to avoid the operation of the statute, would not the same rule require that the *party to be charged*, and only that party, shall be allowed the benefit of it ? In the case at bar, Heman J. Redfield, the party who now nominally interposes that plea, is neither to be benefitted by its application nor injured by its rejection.

Judge Woodruff, in his opinion, at folios 77–8, page 32, of the Record, says: "If it be true that

" for the purposes of this suit, the defendant has
" no interest in these actions, then he has or should
" have no control of these actions ; then he could
" not do or say anything which would affect, or
" which should be permitted to affect the rights of
" the Government."

Upon the principle that the debt is still a subsisting debt, if the debtor does not claim the benefit of the statute, it is *for the most part not competent to any other person to set it up.*

Darby & Bosanquet on Lim., p. 12, and cases cited.

The construction is that the debtor must be personally chargeable.

Whipping *vs.* Hillary, 5 Carr. & Payne, 209.
5 Burr. 2628.
9 Ir. ch. Rep., 284.
McClelland, 45.

Third Point.

The Defendant cannot set up this bar of the statute, after his term of office had expired.

The defendant ceased to be Collector of Customs on the first day of July, 1857. His official connection with the Treasury Department terminated on that day, and his successor was appointed.

Now, it will be conceded that after his term of office had expired, he could do no act as such collector, to bind the Government; and it necessarily follows that could do no act to take away the obligation of the Government, or release them from their liability to these plaintiffs. At this time these claims were valid and subsisting obligations against the Government, and if he could not charge them, he could not release them.

Suppose at this time these claims had been barred by the statute, could he, by any act or promise of his, take the case out of the statute? If while he was the ministerial agent of the Government, he could not charge the Government, surely when he ceased to be such agent, he could not release them.

The allowance of this plea enures to the benefit of the Government, and when the defendant ceased to be collector, he gave up and surrendered all personal control over these demands, and in his own language, in September, 1859, "he no longer had any *control over the adjustment of the claims*, and, as far as he was concerned, Auditor Ogden had the whole charge of the matter," &c.

He, therefore, could do no act either to *establish the claims*, or to *disallow them*, that is, he could *neither pay them* or *refuse to pay them*, and being thus circumstanced his promise could have no effect either upon the government or these plaintiffs. He stood in a neutral position with neither *power to bind or to loose*, and he remains in this position up to this day.

Occupying this neutral ground, he undertakes, five years after his connection with the government had ceased, by pleading the statute of limitations, to discharge that government from the payment of their just debts by virtue of his position as nominal defendant, knowing that, could an action be maintained *directly against* that *government*, no *such defence could be interposed.*

It was said, on the argument of the motion for an injunction, that the deponent, having been instructed by the Treasury Department to set up the statute of limitations, he was bound to obey such instructions. Why did the Department give instructions, if they have no interest? This might have been true, if the defendant, when he interposed this plea, was *Collector of Customs*, but it happens that his term of office had expired seven years before, and he was no longer under the control of the Treasury Department, and was not bound by its instructions. The most that can be said is that, after he left the office the *Secretary* had a right to defend the suit, in the name of the Collector, for the benefit of the Government, that having been designated by law as the officer of the Government, in whom the rights of that government shall be represented, the Government had the right to use his name in defending the suit, and that leads to the real point in this case, that the *defendant, Heman J. Redfield, is a mere man of straw* in this suit, and that the United States are the real parties in interest.

Fourth Point.

The United States are the real parties in interest.

To what has been said before, touching this point, we add, that it has been held, that an action will not be against a collector of customs of the U. S Government, for the wages of a person employed by him as nightwatch and oarsman, because the doctrine of *respondial superior* applies to such case.

See Act of March, 1863, Sec. 12 and 13, U. S. Stat. at L., page 741.

Nicols *vs.* Moody, 22 Barbour, page 611.

In the case of the U. S. *v.* Jarvis, Davis Rep., 274, in was held that the U. S. were liable for rent and *clerk hire* of the *Navy agent* for Boston and Charlestown, on the ground that they were necessary and proper in executing the business of his agency.

So it follows, that in an action by the Government against Mr. Redfield, to recover the moneys received from these plaintiffs for duties, Mr. Redfield could offset as against such claim, any amount that he had been compelled to refund, on the ground that they had been illegally exacted.

In every case in which the agent sues in his own name, two consequences follow:

1*st*. That the defendant may avail himself of those defences which would be good as against the *agent*, who is the plaintiff on the record.

Gibson *vs.* Winter, 5 B. & Old., 96.
Wilkinson *vs.* Linde, 7 M. & W., 83.
Boncom *vs.* Rademiuns, 7 T. R., 663.

2*nd*. That he may avail himself of those defences which would be good as against the principal, for whose use the action is brought.

Wilstead *vs.* Levy, 1 M. & Rob., 138.
Migginson *vs.* Harper, 4 Tyrole, 94.
R. *vs.* Hardwich, 11 East., 578.
Harrison *vs.* Wallace, 1 Bing., 45.
Smith *vs.* Lyon, 3 Comp., 465.

So *mutatis mustandis*. In every case in which the agent or person appointed by the statute to be sued is prosecuted, the plaintiff may avail himself of those causes of action which would be good against the party who is the defendant on the record, and also those which would be good as against the principal for whose benefit the action is defended.

Fifth Point.

If the defendant, Redfield, ever had the right to, set up to this defence of the statute, his principal, the United States, by the Secretaries of the Treasury has, since the defendant's term of office expired, *taken away that right by acknowledging the debt within six years before the commencement of this suit.*

See Schedule A, B, C and E, folios 20, 23, Record.

These acts of the Secretary certainly do away with the idea of any personal obligation in relation to these claims on the part of the nominal defendant.

The legitimate inference to be drawn from the action of the Secretary is as follows: "Certain "parties (plaintiffs in these suits), having claims "against the Government, that originated in the "administration of the office of Collector of Cus-"toms by Heman J. Redfield, Esq., and we, having "recognized and allowed the justness of these claims, "and we having, upon the plaintiff's application, "for payment instructed Mr. Redfield to adjust and "certify them to us for payment, and he having "omitted to do so, we call your attention, Mr. "Schell, as his successor, to those instructions, and "require you to have the same complied with at "your earliest convenience."

See Schedule E, folio 23, Record.

It seems to us that it would be a breach of *national* faith, and certainly of common honesty, to allow a party so circumstanced to interpose a defence which shall prejudice an honest creditor of the Government.

Angel vs. Lim., § 208, etc.
Dean & Hewitt, 5 Wendell, 257.
12 Wheat (U. S.) 565.

Sixth Point.

By the first section of the statute of 31 March, 1817, “ *All claims and demands whatever, by the* “ *United States or against them, and all accounts* “ *whatever in which the United States are concerned as debtors or as creditors, shall be settled and* “ *adjusted in the Treasury Department.*”

Now, by the terms of this law, it is undoubtedly incumbent upon all creditors of the United States, in the first instance, to present their claims to the Treasury Department for settlement and adjustment, and until thus settled and adjusted they cannot be paid.

In conformity with this law, the plaintiffs furnished, before November, 1859, bills of particulars of their claims to the proper officer of the department for adjustment (Bill, fol. 19), and it then became the duty of the Secretary of the Treasury, as it had been the practice, and as they were required by law, to adjust and settle these claims. The Department had the invoices and entries, and all the necessary vouchers for ascertaining the correctness of these claims on file in the Custom House, had acknowleged their justness and legality, and had gone so far as to direct the proper officers to prepare the proper papers for such refund. The Secretary had in effect said, “We admit the illegality of these exactions and our obligation to refund them, and will do so, as soon as the proper officer (the Collector of Customs) shall furnish and certify a statement of the amount, which we have directed him to do.” The directions and instructions of the Secretary of the Treasury to Collectors are binding by law. “Act Aug. 20, 1842, Sec. 24.”

These claims remain still in the hands of the Government unajusted and unsettled.

It was, undoubtedly, in view of this obligation on the part of the Secretary of the Treasury to settle and adjust these claims, that he informed these plaintiffs, in 1859, "That all the plaintiffs "had to do to prevent the statute of limitations "from running, was to present their claims for ad- "justment, upon which presentation, by the rules "and practice of the Treasury Department, the "statute ceased to run." "See fol. 11-12, Record."

The defendant, on the record, also made similiar statements, all of which was such a proceeding on their part as wholly to repudiate the idea that, while such process of adjustment was in operation, the plaintiffs were loosing all their claims by lapse of time.

It may be said all this is true, but these statements did not hinder the plaintiffs from commencing their suits against the Collector of Customs. Perhaps so; but we were not compelled to take that course; we certainly should not have been justified in doing so, since the adjustment of a portion of the claims had been actually commenced, and after the party in interest, the United States, who had always stood behind the collectors and fully indemnified them in all such cases, had promised the plaintiffs to pay their claims as soon as the amount should be adjusted, who had said, we acknowledge the justice of your claims and our obligations to pay, and will do so, as soon as the amount can be ascertained. But it does not lie in the mouth of the defendant to make such an allegation when it is through his own fault, and disobedience of the orders of his superiors, that the plaintiffs have been delayed in obtaining their just dues.

Seventh Point.

The Treasury Circulars, and other letters of instructions from the Secretaries of the Treasury in relation to thsee claims on the revenue, dated :—

Feby. 1, 1856,	marked	Schedule	A,	folio	20.
Oct. 4, 1856,	"	"	B,	"	21.
May 27, 1857,	"	"	C,	"	21.
May 21, 1858,	"	"	E,	"	23.
May 18, 1858,	"	"	F,	"	23.
May 20, 1858,	"	"	G,	"	24.
May 27, 1858,	"	"	H,	"	25.
May 21, 1863,	"	"	D,	"	22.

Like Revenue Laws, are to be read and construed together in pari materia as one document; as an agreement and promise touching the subject matter involved, and taken together they show.

1st. An acknowledgement of the plaintiff's debt by the Secretary of the Treasury, which takes the case out of the statute: and

2d. Representations which estop the United States, the real defendants, from interposing the plea of the statute of limitations.

The defendants' hopes seem mainly centered on the case of Shapley *vs.* Abbott, 42 N. Y., 443.

"In that case, the plaintiff commenced an action
"upon a promissory note more than six years after
"its maturity, more than six years after the cause
"of action accrued; the defendant pleaded the
"the Statute of Limitations; the plaintiffs replied
"that defendant had promised him, before the
"statute began to run, not to plead the statute if
"the note did outlaw.

"There was no memorandum or note in writing
"of this agreement, and no reference to any memo-
"randum in writing to fortify the bare, naked,
"and oral statements of the parties, and the Court
"held, that under the particular circumstances of
"that case, the purely oral promise of the defend-
"ant, unsupported by any consideration or by any

"collateral written memorandum, that he would "not plead the statute, could not be construed "into a new promise, which would take the case "out of the staute, nor could it be regarded as an "*estoppel in pais.*"

But the case at bar is clearly distinguishable from the case of Shapley *vs.* Abbott.

The plaintiffs had certain claims due them, from the Government of the United States, for duties overpaid, under protest, which that Government, by its Secretary of the Treasury, had admitted, by a general circular, to be due..

See Schedule A, folio 20.

And upon the plaintiffs', "A. Iselin & Co., and others," application to have the amount thus admitted to be due refunded to them, the Secretary of the Treasury directed, first, the defendant, Redfield, at that time Collector of Customs at New York, to refund it, or to adjust the plaintiff's accounts or claims, and certify the amoant to him, the Secretary, for payment.

See Schedules B & C, folios 21-22.

And subsequently, on plaintiff's complaint at the delay of the Collector in adjusting these claims, in preparing the certified statements, the Secretary *directs* Mr. Schell, the successor of Collector Redfield, to do it.

See Schedule E, folios 22-23.

Here are plain, positive admissions of plaintiffs' claims, and directions *by* two successive Secretaries of the Treasury, *to* two successive Collectors of Customs, agents and subordinates of the Secretaries, to prepare the usual certified statements for the re-payment of these over paid duties, plain promises to pay, which clearly take these cases out of the statute.

These directions to these Collectors were all given in response to the plaintiff's applications to the Secretaries of the Treasury, and are equivalent to acknowledgments of, and promises to, the plaintiffs, to pay them the amounts due them.

Take a parallel case, where a banker is applied to by a party, who claims that he, the banker, is indebted to him for certain moneys overpaid and admitted to be due by a general circular issued by the banker, over his signature, the amounts of such over payment, being ascertainable only from the banker's own books and papers. The banker, being at a distance, writes to his confidential agent and bookkeeper, directing him to adjust the claimant's account, and certify to him, the banker, the amount of his claims, for payment, and by the same mail refers the claimant to his, the banker's, agent. Would not that be a sufficient acknowledgment of indebtedness to take the case out of the statute?

And such promises, though nominally made to third parties, were calculated and intended to influence the plaintiffs' actions, and are therefore binding on defendant.

See 2d Story Equity, §1521, a.
Wakeman *vs.* Sherman, 5 Selden, 89,

and cases there cited.

Clark *vs.* Hougham, 2 B & C., 149.

The facts of this last case are somewhat analogous to the case at bar.

The letter of May 21st, 1858, schedule E, shows conclusively that not only these plaintiffs, but also the Treasury Department, were impatient of Mr. Schell's delay in carrying out the Department's instructions of October 4th, 1856, and May, 1857, hence the peremptory directions that these previous "instructions should be complied with at his earl-

"iest convenience." Here are directions to a subordinate, to prepare from the papers the invoices and entries on file in the Custom House, a statement of the amounts due the plaintiffs, that the Government, the only real party in interest, may pay them.

This acknowledgment is ample to take the case out of the statute.

See Clark *v.* Dutcher, 9 Cow., 628.
Bucket *v.* Church, 9 Carr & P., 209.
Dobbs *v.* Humphries, 10 Bing., 446.
Long *v.* Mackinzie, 4 Carr & P., 463.

A year and more rolled on, and the peremptory instructions to Collector Schell, of May 21st, 1858, were still disregarded. The plaintiffs' claims remained unadjusted, and of course, unpaid, and the question arose, must the plaintiffs sue all these claims, more than three hundred, in number, and run up three hundred bills of costs, amounting in all to $30,000.

The Auditor of the Customs, the agent and subordinate of the Secretary of the Treasury said *no*, that by the rules of the Treasury Department, of long standing, where the Department had acquiesced in the decisions of the Courts, and given instructions to refund, it was not necessary to commence suits to prevent the statute from running against such claims, but only to present them to or file them with the auditor, or his refunding clerk, giving the name of the vessel and date of arrival, on which the return of duty is claimed See letters of Secretary of Treasury.

Mr. Redfield, the defendant, disclaimed any control over the adjustment of these claims, but concurs with Mr. Ogden, that it was not necessary for plaintiffs to bring suits to prevent the statute from running, but only to present their claims for adjustment with the auditor or his clerk.

The plaintiffs, not wishing to be guilty of laches or neglect, and not wishing to make any mistake which would jeopardise their claims, and at the same time not wishing to subject the Government of the United State to the unnecessary expense of sueing three hundred claims, which that government had given instructions to pay ; and for the purpose of removing all doubt on the subject, their attorney proceeded to Washington, and made known to the Secretary of the Treasury the exact position of their claims ; the representations made by Mr. Ogden, the agent and subordinate of the Secretary, as well as of the defendant Redfield himself, in respect to the Statute of Limitations, and enquired of the secretary, if the plaintiffs could rely on the representations that suits need not be commenced to prevent the statute from running, provided the plaintiffs presented their claims for adjustment in proper time.

The enquiry was put in a plain, straightforward way, in such a manner as to arrest the Secretary's attention ; he did not reply off hand in a heedless way, but he first consulted with the clerk at the head of the Customs Bureau, the Bureau having charge of the matter of refunds, and upon such consultation, he replied, that the representations of Mr. Ogden, the auditor, and of Mr. Redfield, the defendant, were correct ; that such had been the practice for many years ; and he adds, "latterly, the Department, "with a view of discouraging a multiplicity of "suits, have become even more liberal" in its practice, and referred plaintiffs' counsel to the rule established or recognized in the case of Sawyer *vs.* the Collector of Boston, as shown by the letters of May 18th, 20th, and 27th, 1858. See schedules F, G, and H, folio 23 25 ; and the Secretary then said, "that under this latter ruling of the Department *the Statute had already ceased to run against the plaintiff's claims*, and that plaintiff's attorney could assure his clients that it was wholly unnecessary to commence suits, the Department having acquiesced in the decision of the Courts, and given instructions to refund; and he trusted that Collector Schell, who had been instructed to do so, would soon find time to carry these instructions into effecct.

EIGHTH POINT.

ESTOPPEL.

The nominal defendant, Heman J. Redfield, and the United States, the real party in interest, are both estopped from setting up the bar of the statute by their acts and admissions to the plaintiffs, before the commencement of these suits. (See bill, folios 10–25.)

On the 4th of October, 1856, the defendant on the record, was directed by his superior, the Secretary of the Treasury, acting for the United States, to take the necessary steps for the payment of the claims of these plaintiffs; and in May, 1857, the same instructions were also given to the defendant on the record; all which directions and instructions the defendant wholly disregarded, and continued to disregard, as long as he remained Collector, up to the 1st of July, 1857. The defendant, as such Collector of Customs, had been furnished with a bill of particulars of the plaintiffs' claims; the plaintiffs had done all they could do in the premises. The collector had all the evidences of the justness and correctness of the claims in his possession, and all he had to do was to direct his subordinate, the refunding clerk, to prepare a proper statement of the same, for the action of the Secretary of the Treasury. The plaintiffs had no control over, or access to, these papers and evidences of indebtedness on file in the Custom

House, and had no means of ascertaining the amount.

Again, in May, 1858, the former instruction to the defendant, not having been complied with, the United States, by the Secretary of the Treasury, again called the attention of the then collector, Mr. Schell, to their former directions of October, 1856, and requested to have the same complied with; but the then collector utterly neglected and refused to comply therewith. It will be observed that the instructions of October, 1856, were given to the defendant on the record, who was then collector of customs, by Mr. Guthrie, who was then Secretary of the Treasury, and that the letter of May, 1858, calling the attention of Mr. Schell, who was then collector, to the instructions of October, 1856, was signed by Mr. Cobb, who was then Secretary of the Treasury. The same acts required of Mr. Redfield, in October, 1856, were required of Mr. Schell, in 1858—not by *new instructions*, but by calling his attention to the instructions given to Mr. Redfield, and not by the same secretary, but by his successor, clearly showing that these instructions and duties pertained to the *office*, and not to the individual or person who may for the time chance to fill it; that all the acts of the collector and of the Secretary of the Treasury in relation to these claims were acts of the *office*, and not of the individual.

Now, both these parties assured these plaintiffs that all their claims having been presented at the Custom House, for adjustment and settlement, that it had been the practice of the Department for many years, and with a view of discouraging a multiplicity of *suits*, to regard the presentation of their claims to the Department as a bar to the operation of the statute, and that it was not necessary that suits should be commenced to prevent the statute from running, that the plaintiffs might rely upon the application of this rule to their claims, and that the plaintiffs relied on such representations and duly filed the particulars of their claim, and refrained from bringing their action.

Fol. 12 record.

"A party is always estopped to deny his own "acts and admissions, which were expressly "designed to influence the conduct of another, and "did so influence it, when such denial will operate "to the injury of the latter."

Bank *vs.* Wollaster, 3 Harring. 90.

"A party is always estopped from denying the "truth of a fact upon the faith of which he has "suffered another person to act, knowing at the "time that the other's conduct was materially in-"fluenced by a reliance upon the truth of that fact."

Hicks *vs.* Cram, 17 Verm., 449.

"As a general rule, a party will be concluded "from denying his own acts or admissions, which "were expressly designed to influence it, and when "such denial will operate to the injury of the "latter."

Welland Canal Co. *vs.* Hathaway, 8 Wend., 483.

Swain *vs.* Seamans, 9 Wallace, 254.

McClellan *vs.* Kennedy, 8 Maryland, 230.

Cummings *vs.* Webster, 43 Maine, 192.

Bronson *vs.* Wirth, 17 Wallace, 32.

The Cont. N. B'k *vs.* The Nat. B'k of the Com., 50 N. Y., 575, cases cited.

Cowen & Hill's notes to Phillips, E. 200.

2d Campbell, 344, Stanard *vs.* Dunkin.

Chapman *vs.* Searle (3 Pickering, 38).

Titus *vs.* Morris, 40 Maine, 348.

Taylor *vs.* Ely, 25 Conn., 250.

McAffeety *vs.* Conover, 7 Ohio, 399.

Whitaker *vs.* Williams, 20 Conn., 98.
Wanall *vs.* Lathrop, 30 Vt., 307.

"The basis of an estoppel *in pais*, is fraud, not "necessarily intentional, but there must have been "a confidence reposed, which would be betrayed to "the injury of one party, if the other is permitted "to retract his admissions or denial."

42 N. Y. Rep., 448, and cases cited.

Contrary to the feeling which seems to have pervaded the courts with regard to other cases of estoppel, their inclination seems to have been, to extend the list of *estoppel in pais*, especially in mercantile transactions, where men are obliged to trust much to appearances, and hence the general rule laid down seems to be that in the case of Pickard *vs.* Sears (6 Adolphus & Ellis, 475), when Lord Denman, in delivering the judgment of the court, says: "The rule of law is clear that," etc., etc. (Read his decision.)

This principle is fully affirmed in the cases of Gregg *vs.* Wells, 2 Perry & Davidson, 296, Adolphus & Ellis, 439, and numerous other cases; and in our own courts in Corles *vs.* Bacon, &c., 4 Blatchford, C. C. R., 1 to 11, &c. (Read authorities.)

The recent decisions of the courts, both in this country and in England, have given a much broader scope of the doctrine of *Estoppel in pais*, than that which it had formerly, and have established, that whenever an act is done, or a statement made by a party which cannot be contravened or contradicted without fraud on his part, and injury to others, whose conduct has been influenced by the act or admission; the character of an Estoppel, will attach to what would otherwise be mere matter of evidence, and it will be binding upon a jury, even in opposition to proof of a contrary nature.

Stephen *vs.* Baird, 9 Cowen, 274.

"When one by his words or actions intentionally "causes another to believe in the existence of a "certain state of things, and thereby induces him "to act on that belief, so as injuriously to affect "his previous position, he is precluded from aver-"ring a different state of things existing at the "same time."

Corles *vs.* Bacon, 21 Conn., 451.
Brown *vs.* Wheeler, 17 Conn. 345, 355.
Roe *vs.* Jerome, 18 Conn., 138, 153.
Carpenter *vs.* Stilwell, 12 Barb. 128; 4 Blatchford, 1 to 11.
Dezell *vs.* Odell, 3 Hill, 215.

Now let us apply the principles of these cases to the case at bar.

In 1859, the plaintiffs suggested to the Auditor of the Custom House, Samuel G. Ogden, who has the immediate charge under the collector of adjusting these claims, that the statute of limitation would apply to said claims, and they supposed that it might become necessary to commence suits to prevent that statute from becoming a bar. In reply to which Mr. Ogden informed the plaintiffs that the department having given instructions to refund the money in those cases, it was not the fault of the department that it was not refunded; that the instructions of the Secretary to the Collector in May, 1858, were peremptory, and all the plaintiffs had to do to prevent the statute of limitations from running, was to present their claims in such case to the refunding clerk in the Auditor's office for adjustment, upon which presentation, by the *rules and practice of the Treasury Department, the statute ceased to run.* (Fols. 1 and 2 of bill.)

Again, in September, 1859, the plaintiffs' attorney in conversation with defendant Redfield, on this question of the application of the statute of limitation to these claims, stated to the defendant what the auditor, Mr. Ogden, had said on the subject, and the defendant said that he no longer had any control over the adjustment of these claims, and that Auditor Ogden had the whole charge of the matter, and he must be, from his long experience, familiar with the practice of the department, and he could rely upon the accuracy of Mr. Ogden's statement ; and shortly after, at a meeting of the said attorney, and said Ogden; and said Redfield, said Ogden stated to said Redfield, as he had before to the attorney, that, according to the *practice of the department*, if the plaintiffs had already presented their claims for refunding, or if they would do so, the statute *ceased to run* from the date of such presentation as *effectually as if the suit was commenced*, and he corroborated his assertions by referring the defendant to decisions of the department to that effect, *in all of which the defendant concurred.*

So far, then, we have the direct statement of the defendant that it was the practice of the Treasury Department not to interpose the defence of the Statute of Limitation to the claim of the plaintiffs, and that they regarded, and always acted upon the basis that the presentation of their claims was a full bar to the operation of the statute, and added that all the claims would, of course, be paid.

The plaintiffs, relying upon this statement, thereupon filed their claims in the proper office.

But, again, in order to show that the defendant did not make these representations and suggestions without full authority, the plaintiffs, anxious to place themselves properly in relation to the claims, and to confirm or disaffirm these declarations of the defendant on the subject of the action and purposes of the department, had an interview with the Secretary himself, in which they were informed by him that the statements of the Collector were correct, and that such had been the practice of the department for many years ; and that atterly the department, with a view of discouraging a multiplicity of suits, had become even more liberal in its practice, and referred to the case of Sawyer against the Collector of Boston, as shown by the letters of May, 1858, and that under this ruling of the deparment, the statute *had already ceased to run against these claims, and that the attorney could assure his clients that it was wholly unnecessary to commence suits*, the department having recognized the legality and justness of these claims and given instructions to the Collector to prepare the usual certified statements, in order that the money might be paid over.

This is, it seems to me, clearly a case in which the defendant, by his words and actions, has caused the plaintiffs to believe that their rights would not be affected by the delay in commencing suits, and that the plaintiffs have acted upon such representations to their great prejudice. The defendant has falsely represented to the plaintiffs the existence of a certain state of facts, which he now seeks to avoid for his pecuniary benefit, not only in conscience, but in law; the defendant cannot be allowed to set up his own fraud and breach of faith in order to derive an advantage for himself, to the injury of the persons deceived by him. It would be giving him the fruits of his inquity, and bidding a bounty upon treachery and fraud.

42 N. Y. Rep., Shapley *vs.* Abbott, page 443, fully sustains our position in this case. We do not claim a promise on the part of the defendant on the record, or the Secretary of the Treasury, not to plead the statute of limitations, and so far the above case does not apply; but so far as the opinion of the Court goes to define the doctrine of *estoppel* in *pais*, it is a direct decision in our favor.

Let us look again at the facts stated in the bill, olios 11, 12.

This defendant represented to us a *fact*, that acording to the practice of the Treasury Department, if the plaintiffs had already presented their claims for refunding, or would do so, the statute ceased to run *from the date of such presentation as effectually as if suit was commenced.* Now this was a fact in the knowledge of the defendant, and unknown to these plaintiffs.

Again, the plaintiffs, in an interview with the Secretary of the Treasury in the latter part of 1859, were informed that the statements made by the defendant to the plaintiffs were correct; that such had been the practice of the department for many years, and that under the rulings and decisions of the department of the Treasury, the statute had already ceased to run against these claims.

Now these were statements of *facts* within the knowledge of the Secretary of the Treasury, and of course were wholly unknown to the plaintiffs, and the plaintiffs, believing them, relied upon them.

In addition to the cases above cited, we may refer to the case of Dyer *vs.* Cady (20 Conn., 563), in which Hinman, J., says: The rule on this subject which the Court has repeatedly sanctioned, is, "*that when one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act in that belief so as to alter his own previous position, the former is precluded from averring as against the latter a different state of things as existing at the same time.*"

Mr. Starkie, vol. 2, p. 16, says: "If a representation be made of any *fact*, with a view to influence the conduct of another, or to derive any advantage to the party, and which cannot afterward be *denied* without a breech of good faith, such an admission will not only be evidence of the fact, but will usually preclude the party who has made it from insisting upon the contrary. It *estops the party* on grounds of policy from repudiating his own representation, and renders the actual truth of the fact immaterial.

In the case of Hawes *vs.* Marchant, 1 Curtis, C. C., Rep. 144, Judge Curtis says:

"The law of estoppel by acts *in pais* has been "greatly extended in modern times. Its operation "is so just that it commends itself to every fair "mind, and it is sufficiently exact, certain and "safe, when kept within the principles upon which "it depends.

"Those principles require that, to constitute such "an estoppel, a party must have designedly made "an admission inconsistent with the defence (or "claim) which he proposes to set up, and that another party has, with his knowledge and consent "so acted on that admission, that he will be injured by allowing the admission to be disproved; and this injury must be co-extensive "with the estoppel."

The difference between an *estoppel in pais* and a *new promise* seems to be this. An *estoppel in pais* applies to those cases where a representation be made of any *fact* by one party to another ignorant of such fact, to his prejudice, it is founded in *fraud, which may be unintentional.* Whereas a new promise is *founded on contract*, and is deliberate. The case of Gaylord *v.* Van Loon, 15 Wend., was based upon a new promise or contract by the defendant not to *avail himself of the statute*, but at the same time he denied *that he owed the plaintiff anything*, and the Court very properly decided, that what the defendant said could not be construed into a new promise or recognition of indebtedness, while he denied all indebtedness, and this was all of the case. There was nothing said about the doctrine of *estoppel in pais* that applied to the case. The case of the Utica Insurance Co. *v.* Bloodgood (4 Wend., 652). The doctrine of estoppel did not arise, the written stipulation being quite sufficient of itself to take the case out of the operation of the statute. The learned Judge could not have meant to apply the term estoppel in its *tech-*

nical sense of estoppel in pais, because the stipulation lacked all the important elements in the definition of that term, as shown by the cases cited by the Court. The very first case cited was Starkie, vol. 2, p. 16, above cited, there was no *fact* stated with a view to influence the conduct of the other and which was unknown to that other. There was *no representation* that was false.

An *estoppel in pais* is a rule of evidence, and not a mode of enforcing contracts. It cannot be resorted to to compel a person to perform his engagements when the *facts* involved are known to both parties. It is essential to every *estoppel in pais*, that it relates to some *matter of fact*, which has been previously admitted or denied by the party claimed to be estopped.

It is also necessary that the fact should be one of which the party claiming the benefit of the estoppel was ignorant. The basis of an *estoppel in pais* is fraud, as above stated.

If we test this case of Gaylord *v.* Van Loon by these rules, we shall see that it lacks the principal elements of an *estoppel in pais*. It relates not to a matter of fact, but to a matter of contract ; there is no fact involved in the transaction of which the plaintiff was ignorant. He could not, therefore, have been *deceived* in any thing, no fact misrepresented or misunderstood ; nothing whatever to bring the case within the principle of *estoppel in pais*. The Court did not in this case intend to decide that an *agreement not to plead the statute*, is an *estoppel in pais* when they determined that such agreement might be replied in answer to a plea of the statute of limitation.

All they meant undoubtedly was that, the defendant was deprived of the benefit of the statute by *his agreement*, not to avail himself of the statute. And this was the view that the Court in the case in 42 N. Y. (Sharply *v.* Abbott) took of this same case.

The case of Tuffts *v.* Harris (5 New Hamp. R. 452) is clearly a case for the application of the doctrine of *estoppel in pais*, that was a case of *misrepresentation* of facts, by which the party was misled.

The learned Judge, before whom the demurrer was argued, and whose opinion is printed at length in pages 28 to 38 of the Record, seems to have utterly failed to comprehend the facts as set forth in the bill, or has ignored and neglected to state them correctly in his *labored argument*.

He says (see folios 75, 76, page 31):

" The case made by the bill may be briefly, but " we think *completely*, for all the purposes of the " demurrer, stated as follows, assuming, of course, " the facts alleged:

" The complainants had just legal claims to be " repaid, the excess of duties paid by them under " protest, upon certain goods imported, and the " defendant was liable to them therefor. The " statutes of limitation were about to take effect " as a bar to an action for such excess, and the " plaintiffs contemplated bringing suits. An officer " in the New York Custom House (Mr. S. G. " Ogden) stated to the plaintiffs' attorney, that, " by the rules and practice of the Treasury Depart-" ment, the presentation of their claims to the " auditor, or to the refunding clerk at the Custom " House, prevented the running of the statute of " limitations, and if so presented, and a suit was " thereafter brought, the statute could not, and " would not be interposed as a defence. The de-" fendant, disclaiming any control in the matter, " but declaring his confidence in the experience " and knowledge of such officer, expressed to the " plaintiffs' attorney his concurrence in the state-" ment and opinion thus given.

" The plaintiffs did present their claims; and, in " reliance upon the recognition by the Secretary of " the Treasury of claims of a like nature, and upon

" the statements and opinion of such officer, and
" the concurrence of the defendant therein, refrained
" from bringing suits until after the statute had
" run against all of the claims. Suits having been
" then brought, and the defendant having interposed
" the statute of limitation as a bar, the complainants,
" seven years and upwards after these
" pleas of the statute of limitations were filed,
" apply to this Court, as a Court of Equity, to
" restrain the defendant from insisting upon the
" statute as a defence."

We submit that this "brief statement" of the learned Judge, as quoted above, is *not* complete, but wholly *incomplete*. He has omitted the very gist—the vital part—of the plaintiffs' allegations, viz.: that after the above representations and allegations of the Auditor and the defendant Redfield,
"The plaintiffs' attorney made known to the *Secretary*
" *of the Treasury, the situation of the plaintiffs'*
" *claims, and the representations of Auditor*
" *Ogden and Collector Redfield* * * * and inquired
" of the Secretary whether the plaintiffs
" could rely upon these representations and statement,
" that suits need not be commenced to prevent
" the statute from running, provided they
" presented their claims for adjustment in proper
" time: and the Secretary, after consultation
" with the clerk at the head of the Custom
" Bureau, replied that *such had been the*
" *practice for many years*, and that latterly
" the department, with the view of discouraging
" the multiplicity of suits, had become even *more*
" *liberal* in its practice, and referred to the case of
" Sawyer against the Collector of Boston; that under
" this latter ruling * * * *the statute had*
" *already ceased to run against these claims, and*
" *the plaintiffs' attorney could assure his clients*
" *(these very plaintiffs) that it was wholly unne-*

"*cessary to commence suits: the department hav-*
"*ing acquiesced in the decisions of the Courts, and*
"*given instructions to refund.* * * (See folios 11 and 12 of the Record.)

What further precautions could the claimants take? What could have been more honorable than their frank and straightforward appeal to the Secretary? And what could be more frank and honorable than his reply? And these promises and representations made by Mr. Cobb were faithfully kept and performed so long as he remained in office, and his successor, Mr. Chase, also kept and performed them, and the Government of the United States were saved many thousand dollars of costs thereby.

As to the allegation of laches of seven years delay in bringing in this bill, the learned Judge neglected to say how much of the apparent delay is justly chargeable by the defendant; that he did not interpose his plea of the statute until November 17, 1866, two years and a half after the actions were commenced, and here it is important to notice, that in August, 1866, three months before the plea of the statute of limitations was filed, the question, whether this defence should or should not be interposed, was under consideration at the Treasury Departmeat, and was no doubt referred to the Solicitor of the Treasury, and you have his answer at folio 14 of the Record. Nor did he intimate how long it took the learned Judge before whom the demurrers in the actions at law were argued to make his decision. We only know it was not announced and filed until March, 1872. From 1866, to March, 1872, then, the plaintiffs had reason to believe their replications would be held good, and would avoid the bar of the statute, and, therefore, by no fair reasoning can the complainants be charged with any such laches as are imputed by the Court.

Immediately upon the decision on the demurrers in the law cases being filed in 1872, negotiations were opened with the defendant or the government looking to a settlement of these cases; but changes in the offices of the Secretary of the Treasury and Attorney-General delayed the result, as will be seen from the following letter from Secretary Richardson, dated January 10, 1874, till that time:

"TREASURY DEPARTMENT,
"Washington, D. C., Jan. 10, 1874.

"SIR—I have examined your communication "relative to the suits of Andreae *vs.* Redfield, and "59 other cases *vs.* the same, in which you request "that instructions may be issued not to plead the "Statute of Limitations on the part of the government in these cases, and that the Collector of "Customs at New York be instructed to adjust "and certify these cases for payment, according to "the decision of the U. S. Court at New York in "similar cases; 'or that said actions remain in "'Court, and an order of Court be made similar "'to the one under which cases were referred to "'Judge Pierrepont, referring the same for adjustment according to decisions of the U. S. Court "'in similar cases; said adjustment to be without "'expense to the United States beyond the costs "'of the Clerk of the Court.'

"In reply thereto, I have to say that, after full "and careful consideration, I decline to interfere "in these cases.

"I am, very respectfully,
"WM. A. RICHARDSON,
"*Secretary.*

"A. W. GRISWOLD, Esq.,
"*Attorney at Law,*
"New York."

This bill was filed March 10, 1874, sixty days later, and in resorting to this remedy the complainants have simply followed the suggestions of the learned Judge, in his opinion on the demurrers in the actions at law, where he says :

"Such an agreement (as that set up by the plaintiffs), if to be enforced as an agreement, would "seem to me to furnish occasion for an application "to a Court of Equity to restrain the defendant "from pleading his legal defence, where, by reason "of the agreement, and what was done under it, "it was inequitable to plead the Statute. How it "is, as an agreement, a legal answer to the plea, is "not obvious. The theory of an *estoppel* in *pais* "makes the circumstances creating the estoppel "conclusive evidence of the facts imparted "thereby, and as evidence of such facts it "is useful." * * * * A Court of "Equity can deal much better with agreements of "this description, and can examine all the circum-"stances attending the making of the agreement "and its performance, consider all the resulting "equities, and grant or withhold an injunction or "not, as may be just."

Again, the learned Judge seems to have utterly misconceived the facts set forth in the bill ; at all events he has misstated them. He says : "If the "actions are to be treated as if they were actions "against the government, then how can the govern-"ment be prejudiced by any opinion, representa-"tion, or constructive promise made or expressed "by the defendant, and especially by any opinion, "representation, or constructive promise made or "expressed after he ceased to be an officer of the "government ?" * * * "It would necessarily "follow that all that is averred in the bill touch-"ing his assurances or representations, must be "disregarded as irrelevant or immaterial. There "upon, the complainant's case in this Court would "stand, and their claim to an injunction would rest "on these facts, viz.: The Secretary of the Treasury has recognized the validity of all claims of "the like nature, and the complainants were assured *by an auditor in the New York Custom* "*House* that the practice of the Treasury Department was not to plead the Statute of Limitations "in such cases, and that the statute did not run "after the claims were presented to him, or to a "clerk in his office, and could not and would not "be interposed, and on reliance upon this, the complainants omitted to sue until the period of limi- "tation had expired."

Let us see how this statement of the learned Judge squares by the actual allegations in the bill.

After the representations were made by the auditor and the defendant, touching the Statute of Limitations, the plaintiffs went direct to the Secretary of the Treasury, and "made known to him the representations that the auditor and the defendant (both subordinates and agents of the Secretary) had made to the plaintiffs, and asked the Secretary if those representations were true, and if the plaintiffs could rely on them, or must they bring suits on all their claims to prevent the statute from running. And the Secretary replied that their statements were *true*, and that the Statute of Limitations had ceased to run, and would not be pleaded against these cases. See folios 10–12, pages 5–6, of Record.

And it is upon these representations made by the auditor and the defendant, and afterwards *confirmed* and *re-asserted* by the *Secretary* himself, that the plaintiffs claim to hold the Government estopped from denying its own allegations that the statute had ceased to run against these cases.

The learned Judge, however, declares that neither the government officers, nor any authority of the government. not even the Secretary himself, could deprive the nominal defendant of his right to defend by any defence valid and legal for his protection. Folios 21–34.

In view of the fact that the statutes provide that the United States attorney shall appear for and defend all suits against collectors of customs, except where ordered to the contrary by the Secretary, (12 Stat. at L. 741, § 13,) it would require a considerable exercise of the imagination to suppose the nominal defendant in such cases had much to say or do about the defence. We apprehend this Court will not question the authority of the government of the United States to control and manage suits against collectors of customs as they please, so long as the law makes the instructions of the secretary binding on the collector, (see § 24, Act August 30, 1842, 5 Stat. at L. 566), and where the Secretary of the Treasury, as such officer, has pledged the honor of the United States that the statute of limitations had ceased to run, and would not be pleaded as a bar; that the Courts will protect the plaintiffs who have relied in good faith on such representations.

The contrast between this opinion of Judge Woodruff and the views expressed by Judge Smalley is indeed great.

By reference to the Record as well as to a copy of the brief of defendant's solicitor in the Court below, it will be seen that the hearing of the motion for an injunction was brought on before Judge Smalley on April 23d, 1874. It will be observed that the defendant's demurrer had been filed on April 1st, so that the complainant's bill and the defendant's demurrer were before the Court on that preliminary hearing in precisely the same form as they are now. The hearing lasted several days; the arguments were full and elaborate; briefs were submitted on both sides; and when the decision was announced granting the injunction prayed for, and when the order for the injunction was submitted, the defendant's solicitor contended that the injunction order should contain no reference to any hearing having been had on the demurrer, because the notice of argument did not refer to the demurrer, though, in fact, the whole question had been elaborately discussed. And Judge Smalley felt obliged to confine the language of the order to the hearing of the motion for an injunction, without any reference being made to the demurrer or to the fact that the whole question had been fully discussed in all its bearings.

We submit that this decision of Judge Smally, in view of the circumstances under which it was made, is entitled to the consideration of this Court.

The plaintiffs believe upon their showing they are entitled to a reversal of the decree rendered in the Court below.

A. W. GRISWOLD,
Solicitor.

ROBERT INGERSOLL,
Counsel.

TREASURY DEPARTMENT,
May 20th, 1854.

SIR.--I have received your certified statement of the claim of John C. Rheimer, for return of excess of duty exacted at the port of New York, on twisted straw; the said statement being rendered in conformity with treasury instructions, dated 21st March, 1854, acquiesing in the decision of the United States Circuit Court, December Term, 1853.

In a letter accompanying said statement addressed to this department by S. P. Russell, Esq., attorney for the claimant, *a list is presented of importations of a similar article imported by Mr. Rheimer, in the years* 1846, 1847 *and* 1848, *and all of which were very properly excluded by you from said certified statement, as it was not shown by any proof before you, that a demand had been made for payment of the excess claimed with in the term of the Statute of Limitations in force in the State of New York.*

It appearing, however, from the files of this department, that such demand was made by Mr. Russell on behalf of J. C. Rheimer, on the 1*st of February last, the statement is herewith returned, in order that you may add thereto the importations in the list herewith enclosed, made in the year* 1848, *provided it be found that such importations took place as stated in said lists, viz. : on the* 10*th and* 25*th February*, 1848.

Very respectfully,
Your obedient servant,
(Signed.) JAMES GUTHRIE,
Sec'y of the Treasury.

HERMAN J. REDFIELD, Esq.,
Collector of Customs,
New York.

CUSTOM HOUSE, NEW YORK,
Collector's Office, Oct. 11th, 1854.

SIR: I have the honor to acknowledge the receipt of yours of the 6th inst., directing certified statements to be prepared and submitted for consideration of the department in cases where claims are made for return of fees paid by owners and agents of vessels bringing passengers.

Before preparing said statements, I deem it proper to make the following explanations:

The suit already commenced is an experimental one, and is for $61.80 for passengers brought by the ship "Racer," in three voyages, her owners having paid twenty cents for every five passengers, where only one general permit was issued.

This suit is brought in the name of Mr. David Ogden by Mr. Owen, as attorney. The same attorney has in hand the claims of forty-two other parties, which he proposes to put in suit against Mr. Maxwell, provided the department does not consent to the claims being liquidated without litigation, or agree to their proposal to have all settled upon the principle established by the one suit. This may be done by stipulation in Court, with the *assent* of the defendant.

The expenses already incurred in the pending suits, I am informed by Mr. Owen, is less that fifty dollars. You state it is not thought proper at this time to authorize the defence of the suits. *The anxiety of the parties is that they may not be debarred from their claims by the statute of limitations.* This erroneous charge, which has been discontinued by your directions since the 26th of May, 1853, extends over a period of twelve years.

The amount collected is estimated to be seventy-five to one hundred thousand dollars, received in sums varying from $1 to 1.50.

These amounts were not paid under written protests. Our books show the sum received from each vessel at the time of entry.

If the department concludes to refund the fees thus exacted, it would be better to have one statement made out for the ships of each firm or party to whom the vessels were consigned, on the presentation of their claims.

There has been no claims presented at this office. The principal ship owners of this port have placed their claims in the hands of the attorney, who has commenced the suits above referred to. The enclosed statement of Zerega & Co., giving the vessels, time of arrival, also amounts paid upon each arrival, for one general permit, is an illustration of the rest.

These explanations are respectfully submitted for the consideration of the department.

The attorneys are anxious to have an early decision of the case, as they propose commencing the suits next week, if obliged to by your decision; in which case we shall require your instructions to defend.

I am, very respectfully,
Your obdient servant,
(Signed) HEMAN J. REDFIELD.

HON. JAMES GUTHRIE,
Secretary of the Treasury.

Custom House, New York,
Collector's Office, 13th Nov., 1854.

Sir:—With this I enclose you summons and complaint in a suit against the Hon. C. W. Lawrence, late collector.

It is a suit similar to the one brought against H. Maxwell, Esq., for the charge of 20 cents for every five passengers, where only one permit was issued. My report of the 11th ulto. has all the facts.

As this suit is in relation to the official acts of Mr. Lawrence, your instructions are required to have the same defended by the United States District Attorney.

On receipt of yours of the 6 ult. on this subject, the attorneys were seen in relation to the costs already incurred, &c.

They then assented to a delay until the matter should be disposed of by the department.

To-day the enclosed note was received from them, in which they express their anxiety to know the decision of the department in the case of Ogden *vs.* Maxwell.

Yours very respectfully,
(Signed.) HEOMAN J. REDFIELD,
Collector.

Hon. James Guthrie,
Sec. of the Treasury.

Treasury Department,
November 16th, 1854.

Sir:—I have to acknowledge the receipt of your letter dated the 13th inst., in relation to a suit brought in the New York Superior Court by the Trustees of G. W. Ogden against C. W. Lawrence, Esq., late Collector of the Customs, for the recovery of the fees illegally exacted for permits for the landing of passengers' baggage, and referring to a similar suit brought by David Ogden against Hugh Maxwell, Esq., late Collector of the Customs, reported by you to this Department on the 11th ulto.

The Solicitor of the Treasury has been directed to give the necessary instructions to the Attorney of the United States for the Southern District of New York to defend the several suits above mentioned.

With regard to the proposition referred to in your letter of the 11th ulto., as having been made by the plaintiff's attorney in the suit against Mr. Maxwell, "that if several suits are commenced against Mr. Maxwell for the same cause they shall all be determined by the issue of the one tried."

I have to observe that there is no objection to such an agreement being entered into by the attorney of the United States in respect to all the claims of this character brought against either of the former Collectors, *whether suits be entered or not*, except only, 1st. Where no protest was made against the exaction in question, or, 2d. *Where the claim was not presented directly to this department, or through the Collector of the Customs, within six years from the time of the exaction of the fees in question;* in such cases the claims being barred either by the act of Congress of the 26th of February, 1845, or by the Statute of Limitations of the State of New York.

The summons enclosed in your letter is herewith returned as requested.

Very respectfully,
Your obedient servant,
(Signed) JAMES GUTHRIE,
Secretary of the Treasury.

HEMAN J. REDFIELD, Esq.,
Collector, &c., New York.

Dec 19. '78. Rec'd N H Swayne

Supreme Court United States.

OCTOBER TERM, 1878.

OTTO ANDREAE ET AL., APPELLANTS,

vs.

H. J. REDFIELD'S EXEC'RS, RESPONDENTS.

In Equity.—No. 22.

Brief and Argument of R. G. and E. C. Ingersoll, Counsel for Appellants.

WASHINGTON, D. C.:
Taylor, Printer, 833 Twentieth Street.
1878.

Supreme Court United States.

OCTOBER TERM, 1878.

OTTO ANDREAE ET AL., APPELLANTS,

vs.

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In Equity.—No. 22.

Brief and Argument of R. G. and E. C. Ingersoll, Counsel for Appellants.

POINTS.

I.

THE CASE MUST BE DECIDED ON THE FACTS ADMITTED BY THE DEMURRER.

It is admitted by the demurrer that the exactions in question upon these imports were unlawful, and that in order to obtain possession of their goods complainants paid to the defendant under written protest the sums exacted.

That in the year 1853 similar cases had been decided to be illegal by circuit courts of the United States, and one portion was admitted by the Treasury Regulations in force in 1856, to be illegal.

That in October, 1856, upon application to the department such excess was directed to be refunded.

That in May, 1857, the Treasury department ordered the duty illegally exacted on commissions to be refunded.

That under such instructions a large number of similar claims were presented in 1856-7-8 and 9 to the proper officer of the custom house to be adjusted, certified and transmitted to the Secretary of the Treasury, which were paid; but that in July, 1857, collector Schell suspended such adjustments.

That plaintiffs brought the matter to the attention of Secretary Howell Cobb, who directed collector Schell to proceed with the adjustment of these claims. That collector Schell neglected to do so, and in 1859 counsel for complainants conferred with the Auditor of the custom house, who had charge of the adjustment of these claims, in reference to the running of the statute of limitations against these claims, and he stated that it was not necessary for them to bring suits; that upon filing the claims in the Auditor's office for adjustment, by the rules and practice of the Treasury department the statute ceased to run.

That in September, 1859, before actions were barred, the defendant, Redfield, then out of office, assured complainant's counsel that such was the ruling of the department, and that the presentation of the claims to the Auditor caused the statute to cease to run.

That complainant's attorney also saw the Secretary of the Treasury in 1859, in respect to the bar of the statute, and was informed that he could rely on these representations, that suits need not be commenced to prevent the running of the statute of limitations, provided the claims had been presented for adjustment at the custom house in proper time.

Notwithstanding the directions to collector Schell, he refused to permit the adjustment of these claims. May 10, 1864, suits were commenced against Redfield for the amount of these claims, and on removal to the U. S. circuit court, the defendant filed his pleas. The plea of the statute of limitations of six years was filed November 17, 1866, two and a half years after the suits were commenced. That the demurrer to the replications to said plea were not decided until March, 1872.

That the same principle is involved in each of the suits, and the same relief asked, that the defendant be restrained from maintaining in said suits the plea of the statute of limitations.

That to save a multiplicity of suits this bill is filed.

The facts stated show that the Treasury department had settled the law in regard to the liability to refund—that the exactions were illegal—and only awaited the performance by the collector of the ministerial duty of forwarding a statement of the amount due as shown by the records of the custom house. That the rule of the department was, that filing the claim was equivalent to bringing suit so far as the statute of limitations was concerned. That the Treasury department did not hold the collector personally liable for the amount, but was ready to pay the importers, and release the defendant from nominal liability so soon as his successor completed the calculation of the amounts due This was a full and complete recognition by the Treasury department of "probable cause" for the exaction, and it was so regarded by Judge Smalley in the issue of his order for an injunction, in requiring from the complainants a stipulation that a certificate of probable cause should be issued by the court, and that they should not issue execution nor enforce the judgments against Redfield or his property.

At the time the suits were commenced the statute of March 3, 1863, was in force. Section 12 provided for a certificate of probable cause for the act done, or that he acted under the directions of the Secretary of the Treasury or other proper officer of the Government, and that in such case no execution should issue, but that the amount of the judgment should be provided for and paid for out of the proper appropriation from the Treasury.

This action accrued under the act of February 26, 1845, amendatory of the act of March 3, 1839. The latter act required the payment of all sums of unascertained duties, or in excess of legal duties, to be paid into the Treasury, and prohibited suits against collectors for such sums. It took away the common law right of action for money had and received. Section 2 of the act permitted the Secretary of the Treasury to pay back such excess when it was shown to his satisfaction that it had been paid contrary to law.

The act of 1845 permitted the Secretary of the Treasury to pay back the excess of unascertained duties without suit; but provided for suit, after written protest, at or before the payment of the duties, against the collector to recover the amount of duties so paid under protest, and to try the *legality* and *validity* of such demand and payment of duties.

It was in force until June 30, 1864, the act of 1857 (11 Stat., 195) only applying to decisions as to articles being on the free list. See

Barney vs. *Watson*, 2 Otto, 452.

No discretion was given the collector to refund duties erroneously or illegally exacted under the instructions of his superior officers. It was his duty to collect and pay over the amount and, as nominal defendant, to defend the Government when suits were brought. While nominally defending in a personal character the collector was really defending as a representative of the Government.

Section 24 of the act of August 30, 1842, required the collectors to execute and carry into effect the instructions of the Secretary of the Treasury relative to the execution of the revenue laws, and in case of doubt of the construction and meaning of the law made the decision of the Secretary conclusive and binding on them. (5 U. S. Stat., 566.)

This was followed by the act of August 8, 1846, (9 U. S. Stat , 84,) the second section of which authorized the Secretary of the Treasury to refund to the several persons entitled thereto all duties illegally exacted after March 3, 1833, under the sanction of the Treasury department, provided that such duties had been decided, in principle, by the courts to be illegally exacted, and such decisions had been acquiesced in by the Treasury department as its rule of construction.

The applications of complainants for a refund was made by attorney to the Secretary of the Treasury, who issued on the 4th of October, 1856, an order to collector Redfield for the ascertainment of such excess of duties. Had the collector performed his duty promptly the amount due would have been ascertained. The principle upon which the amount was to be liquidated was conceded as having been fixed by the courts, and acquiesced in by the Secretary. The data for determining it were in the possession of the Government, so that it was a matter of mathematical calculation merely to determine the amount. While Redfield professed to be ascertaining this amount complainants declined to sue. When he retired from office, without adjustment of these accounts, the complainants would have been entitled to sue him if the adjustment had been refused by the Secretary; but such adjustment was not made, and Redfield himself urged complainants not to sue, because their right to sue would not be barred by the delay. This was a waiver of his personal privilege.

The Secretary of the Treasury admitted in 1859, that the claims were not barred. Hence, the bar of the statute would commence to run after that date On this principle the cases were commenced in time.

Suits against officers of the customs to recover duties illegally collected are "suits against an officer for a tort or for money had and received, and when a judgment is rendered against him the Government protects him by paying it, because the money was received for its use."

Case vs. *Terrell*, 11 Wall., 202.

II.

THE DEFENDANT IS NOT PERSONALLY LIABLE IN THIS ACTION; BUT IS A NOMINAL DEFENDANT.

See *Case* vs. *Terrell*, 11 Wall., 202.
Collector vs. *Hubbard*, 12 Wall., 12.

So held in the last case, because he is required by law to pay the moneys received into the Treasury, and there is no implied assumpsit on his part for repayment.

The duty to repay money wrongfully paid into the Treasury, is conceded in—

United States vs. *State Bank*, 6 Otto, 36.

Another reason for the liability of the Government, instead of the ex-collector, is that a new obligation arose the moment it was shown to the satisfaction of the Secretary of the Treasury that an over payment had been made.

"To enable the party to reclaim his own in such case, the Government imposes but one condition—that the Secretary shall be so satisfied. The moment he signifies that he is so, the obligation of the Government to refund is complete, without appeal. From that moment the case ceases to be one of revenue, because by the very fact of his being satisfied that the over payment was made, it is finally and conclusively established that, to the amount of the over payment, the Government has money of the importer, which, by express law, it has agreed shall be repaid to him."

"Under ordinary circumstances it would be difficult to decide whether the Secretary of the Treasury had been satisfied of the fact of over payment, if his official declaration to that effect were not produced. It might be questioned whether evidence of any other character would prove the fact. But, as we conceive, it is not necessary that the official declaration should assume the form of a direct and formal adjudication by him of the fact. If in any manner it appears *from himself* that he is satisfied that the over payment was made we are justified in acting."

Broutatour vs. *United States*, 7 Ct. Claims, 560.

III.

UNDER THE NEW YORK STATUTE THE RIGHT TO PLEAD THE STATUTE OF LIMITATIONS IS PERSONAL.

If the suit was of a personal character, and the judgment could be collected from the estate of the ex-collector, he was entitled to plead section 110 of the code, requiring the promise to take the case out the operation of the six years' limitation, to be in some writing signed by the party to be charged thereby.

Under the facts stated and the decisions of this court he was not personally liable.

The statute in question is like rule 16 of the Supreme Court of the State of New York, which required stipulations to be binding to be in writing. In regard to that rule it was held in *People* vs. *Stephens et al.*, 52 N. Y., 510, that "where an oral stipulation or representation has been acted upon, the party making it is not permitted to retract and take advantage of acts or omissions of his adversary thereby induced. The rule has been held not to govern such cases. * * Good faith requires that no advantage should be taken of an omission thus caused, and that the verbal agreement which is not disputed, having prevented the defendants from cutting off the appeal by notice, should be deemed as effectual a waiver of the right to appeal as if evidenced by a writing."

But Redfield, being but a nominal defendant, and prior to the expiration of six years from the exaction of these duties, being ordered to state the account for refund, and these directions being in writing, the statute was complied with as a matter of fact. It was unnecessary to fix the amount due—to take the case out of the bar of the statute. In regard to a letter admitting the debt demanded to be an existing debt, it was held, "It was a substantial acknowledgement of the debt, but not its amount, and as such, it was enough to deprive the defendant of the benefit of the statute of limitations as a defense. For from the acknowledgment made of its existence, the law will imply a promise on the part of the defendant to pay it. It was an acknowledgment of a subsisting liability, and that was a sufficient answer to the defense dependent on the statute."

Chace vs. *Higgins*, 1 S. C. Reports, N. Y., 232,

The admission of the auditor of the custom house at New York that suits on these claims were not barred, and would not be barred by the statute, was made by an officer of the Government, in whose charge these claims then were, with the knowledge of the Secretary of the Treasury, and of collector Schell, and ex-collector Redfield. The case comes clearly within the rule announced in *Alvord* vs. *United States*, 5 Otto, 358, where the presentation of claims to the Assistant Postmaster General was held to be a presentation to the Postmaster General.

The statute under which the right of refund accrued, did not provide for any statute of limitations; but did require that the jurisdictional fact, a *written protest*, should exist. It permitted suits to be brought for exactions made while the law of 1839 was in force. This continued liability of the Government was further recognized by the act of August 8, 1846, which provided for the refund of all duties illegally exacted after March 3, 1833, thus recognizing the duty to return such moneys more than thirteen years after their exaction.

The jurisdiction given courts over illegal exactions was for the purpose of having a trial on the merits as shown by the language of the act of 1845. The same rule applies here as to the Court of Claims, that "The Government, by consenting to be sued, waives the technical defenses and advantages by which ordinary defendants frequently seek to delay or elude an adjudication upon the merits."

Crowell vs. *United States*, 6 Ct. Claims, 29.

The limitation relied on in this case is that of the New York statute governing personal actions, where the person charged with the liability is the person who should pay it. The person to pay the sums due the complainants was the Government. It is the party in privity with the nominal defendant, and is in reality conducting the defense, as under the law and the pleadings Redfield was entitled to be reimbursed the amount of any judgment against him. See

Castle vs. *Noyes*, 14 N. Y., 333.
1 Greenleaf, section 523, p. 559.
Bush vs. *Knox*, 2 Hun., (N. Y.) 578.

In the last case it is held that all privies who claim under or in privity with those who are affected by the litigation, "are estopped from litigating that which is conclusive upon him with whom they are in privity."

The statute can then be pleaded only as if the Secretary of the Treasury was the nominal defendant, and his admissions as to the legality of the demand, and as to his holding the fund simply as trustee for complainants until the account can be verified, must govern this case.

They were sufficient under the decisions of the New York courts, to take the case out of the statute.

In *Shoemaker* vs. *Benedict*, 1 Kern., 176, it was held, "That to continue or waive a debt, there must be an express promise to pay, or *an acknowledgment of the existence of the debt*, with the admission or recognition of an existing liability to pay it, from which a new promise may be inferred."

In *Henry* vs. *Root*, 33 N. Y., 547, the court followed the rule in England, and say that, "the mischief to be provided against was not the want of particularity as to the sum, but looseness of proof as to the fact of acknowledgment."

"The code does not define what the writing shall be; it merely requires the acknowledgment or promise to be contained in some writing signed by the party charged, and for aught I can see, it can as effectually be made in a general assignment for the benefit of creditors as in any other instrument."

Stuart vs *Foster*, 18 Abb. Pi., 305.

"The statement of the notes as assets is in itself sufficient to take them out of the statute. The insertion by an insolvent debtor in the inventory of his debts, of one otherwise discharged by the statute, is a sufficient acknowledgment to revive the acknowledgment to pay."

Ross vs. *Ross*, 6 Hun., (N. Y.) 82.

"An explicit statement that a loan was unpaid and that a present indebtedness existed, was sufficient to revive a debt before the Code. * * The Code (section 110) simply requires the acknowledgment or promise to be in writing. This section was designed to introduce no new principle applicable to reviving stale demands, but solely to prevent the revival of such demands by loose oral declarations."

Kincaid vs. *Archibald*, 10 Hun., (N. Y.) 11.

Letters written a person who holds a redeemable estate in mortgaged property, which were written to an agent of one of the mortgagors, and which left the amount due to be ascertained upon an accounting, was held to be such an acknowledgment of the right to redeem as to take the case out of the statute.

Stansfield vs. *Hobson*, 3 De Gex., M. & G., 626 (52 Eng. Chancery Repts.)

An additional reason against the plea of the statute of limitations is that as to these duties exacted in excess of the statute, the Government is a mere trustee. The case is exactly parallel to claims under the captured and abandoned property act, and the rule applies which is stated in *Padelford's Case*, 9 Wall., 543:

"The Government is a trustee holding the proceeds of the petitioner's property for his benefit."

The rule of Lord MANSFIELD in *Rees* vs. *Abbot*, Cowp., R., p. 832, applies; "Judges should be astute in furtherance of right, and the means of recovering it."

As to the right and the remedy, see
Brown vs. *United States*, 6 Ct. Claims, 178.

The statute of limitation of New York does not apply to trusts, and was not a proper defense in the suit of claimants, as the moneys claimed were held in trust by the Secretary of the Treasury.

The statute of limitations does not run upon an admitted trust.
Purdy vs. *Sistare*, 4 N. Y., Sup. Ct. Reports, 408.
Robinson vs *Robinson*, 5 Lans., 165.

"The oral declarations, though not competent for the purpose of proving a trust, were admissible on the question of the statute of limitations; for this would not begin to run until the trustee in some manner repudiated the trust. So long as he continued to recognize and act under it, he could acquire no title by adverse possession; nor would the parties interested be barred of their right to an account by failing to bring an action."

Barker et al. vs *White et al.*, 58 N. Y., 213.

The same rule is adopted by this court.

"Where there is no disclaimer, the statute has no application to an express trust, such as we have found to exist in this case."

Seymour vs. *Freer*, 8 Wall., 218.
Lewis vs. *Hawkins*, 23 Wall., 126.

The defendant denies that the statute of limitations was waived by the assurances of Redfield that the statute had ceased to run against this claim. As a matter of law Redfield knew that he was not personally liable, that the Secretary of the Treasury had assumed the liability as by law he was authorized, and that in case of trial the court, following the practice in such cases, would give a certificate of "probable cause." He also knew that he was not trustee for the money but the Government was trustee; and that the Secretary of the Treasury had acknowledged the trust, and had promised to refund the money as soon as the amount was determined.

See *Averill* vs. *Smith*, 17 Wall., 88–90.
Stacey vs. *Emery*, No. 52 Oct. Term, 1878.

His statements to the attorney for complainants were made for the purpose of delaying the suits, and they acted upon the statements and continued to press the collector to adjust the amounts due.

The case of *Shapley* vs. *Abbott*, 42 N. Y., 443, was relied on in the court below as decisive of this case.

In that case the debtor assured the plaintiff that "he would not plead the statute of limitations if it did outlaw."

In this case, the defendant Redfield affirmed the statement of Auditor Ogden, that by the filing of these claims with the collector "by the rules and practice of the department the statute had ceased to run," and that he saw no necessity for suing the cases, to preserve them from the bar of the statute.

Here was a distinct admission of fact as well as of law; and even under the decision of the case above cited, it is an estoppel. The court says:

"As another illustration of the rule as I claim it to be: suppose I meet the maker of a note which I hold, and we both know that it is about to outlaw, and I request him to give a written acknowledgment, renewing it, and to leave it with my banker, and he promises to do so; I afterward see him before the note is outlawed, and he says he has done so, and I, relying upon this, permit the statute to run. But it turns out that he did not leave the written acknowledgement. Here again would be the representation of a fact; and in a suit upon the note, the maker would be concluded by his representation upon which I relied, and would be estopped from denying a written acknowledgment"

Shapley vs. *Abbott*, 42 N Y., 450.

"The principle is too well settled to require the citation of authority, that one cannot stand by in silence when he knows that another is acting upon an erroneous state of facts, and thereafter claim the benefit of the correct state of facts, if such claim will tend to the injury of the other person."

Erie Co. Savings Bank vs. *Roop et al.*, 48 N Y., 298.

"There is thus present every element necessary to constitute a case of *estoppel in pais*, a representation made with the knowledge that it might be acted upon and subsequent action upon the faith of it to such an extent that it would injure the plaintiffs if the representation was not made good."

Armour et al. vs. *Mich. Cent. R. R. Co.*, 65 N. Y., 122.

"Admissions of a party, whether of law or of fact, when acted upon by others, are conclusive against the party making them in all cases between him and the person whose conduct he has thus influenced."

Hawley vs. *Griswold*, 42 Barb., 23.

A case exactly in point, affirming the rule above stated is—

Calanan vs. *Mc Clure*, 47 Barb., 209, 210.

In this case it was held that after one rejection of the claim, subsequent negotiations, which were kept alive until the statute had run from the date of the first rejection, were an admission that the matter was still open for settlement, and that the first alleged rejection was waived and abandoned. That "It would be an exceedingly harsh rule which would allow a party to pursue a course of conduct, which would induce another to sleep upon his rights until a statute of limitations had entirely cut off his claim and barred a recovery of his debt."

The same principle was affirmed by the same judge in

Blair vs. *Wait et al.*, 69 N. Y., 116.

This court has announced the same rule in these words:

"Where a party gives a reason for his conduct and decision touching anything involved in a controversy, he cannot, after litigation has begun, change his ground and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold. He is estopped from doing it by a settled principle of law."

Railway Co. vs. *McCarthy*, 6 Otto., 267.
Insurance Co. vs. *Eggleston*, 6 Otto., 577.
Morgan vs. *Railroad Co.*, 6 Otto., 720.

To the same effect are:

People vs. *Liverpool, London & Globe Ins. Co.*, 2 N. Y. Sup. Ct. Repts., 275.
Andes Ins. Co., vs. *Fisk*, 71 Ill., 625.
Davis vs. *Dyer*, 56 N. H., 143.
Voorhees vs. *Olmstead*, 3 Hun., N. Y., 754.

IV.

THE GOVERNMENT IS ESTOPPED FROM PLEADING THE STATUTE OF LIMITATIONS.

While the Government is not liable for the torts of its officers, or their exercise of power beyond that conferred on them, where such acts create a liability, or would involve the Government in a loss, instead of benefit; on the other hand it cannot take the benefits of such acts and put money into its treasury without incurring liability. Nor can it avail itself of the laches of its own officers, who delay settlement, and then plead it as a bar to repayment of the money.

Nor, having once admitted, through the head of the proper department a liability for the claims in question, can a successor repudiate that admission to the disadvantage of the claimant.

It is claimed that the plea of limitation in this case was filed in 1866, under instructions from the Secretary of the Treasury. This is the first instance shown by the record of any attempt **by** the successors of Secretary Cobb to reverse his rulings and those of his predecessors that the filing of the claim took it out of the statute of limitations. It was not competent for the Secretary to reverse the ruling of his predecessor to the prejudice of complainants.

In the case of *United States* vs. *Macdaniel*, 7 Peters, 15, the right of a Secretary to change the usages of his department was admitted, but it was held that such change could not be retrospective. "Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions."

The rule in that case was based on the principle of estoppel, the Government not being allowed to change its ruling to the injury of the claimant. The same rule is affirmed in—

United States vs. *Bank of Metropolis*, 15 Pet., 400.
United States vs. *Collier*, 3 Blatch., 345–353.

V.

THIS GOVERNMENT IN ITS DEALINGS WITH ITS CITIZENS CANNOT AFFORD TO MAINTAIN A POSITION WHICH IS DISGRACEFUL IN COMPARISON WITH THAT OF OTHER CIVILIZED NATIONS, AND WOULD BE DISHONORABLE ON THE PART OF AN INDIVIDUAL.

The Government of this country permits its citizens to sue it directly in the Court of Claims alone. In the circuit courts of the United States it can be sued only as it has permitted suits to be brought nominally against its officers, which are defended by the Government. When the liability of the Government is established, it pays the judgment, denying the claimant the right to execution against the nominal defendant. It it is admitted that the creation of the Court of Claims was due to the example of Prussia and the German States in providing "that claims against the Government are to be examined and decided by the common courts of justice and in the way of a common law-suit."

Brown vs *United States*, 5 Ct. Claims, 577.
Brown vs. *United States*, 6 Ct. Claims, 192–198.

The Government is barred by the same rules of justice as individuals. See—

United States vs. *Wilder*, 3 Sumner, 316.
United States vs. *Barker*, 12 Wheaton, 561.
United States vs. *Smith*, 4 Otto., 218.
United States vs. *Bostwick*, 4 Otto, 66.

VI.

THE RESULT OF THE DECREE OF THE COURT BELOW PROTECTED FRAUD AND INJUSTICE.

The court below placed the decision sustaining the demurrer on these among other grounds:

1. That a judgment against Redfield would be a lien on his real estate.

2. That upon certain conditions it may become the duty of the Secretary of the Treasury to pay the judgment, but "it cannot now be asserted in advance of the trial that such duty will become absolute."

3. That Redfield is not sued as a Government officer "in any such sense, that the suit proceeds against his successor in office."

4. That the plaintiffs cannot change the nature of their action from that of a personal suit to a suit against the Government by the stipulation filed as a condition for granting the temporary injunction.

5. That it would be a fraud upon the Government, "to permit parties, by stipulation, to cast upon Government officers the duty to pay a judgment recovered against an individual."

These assumptions are based upon a mistaken view of the law.

Since March 2, 1799, the Government has paid all judgments, where there was "probable cause" for the exaction, and the money was in the Treasury, and has held instructions of the department to be "probable cause," entitling the collector to personal indemnity.

This court held on a like provision in regard to Internal Revenue collectors: "Such a judgment against the collector is in the nature of a recovery against the United States and consequently the amount recovered is regarded as a proper charge against the revenue collected from that source.

The Assessor vs. *Osbornes*, 9 Wall., 571.

The term "probable cause," in reference to merchandise seized "imports a seizure made under circumstances which warrant suspicion."

Locke vs. *United States*, 7 Ct., 348.
The Thompson, 3 Wall., 162.

"A certificate of proble cause may be granted for doubts of the law."

United States vs *26 Diamond Rings*, 1 Spr., 294.

This has been recognized by the Act of March 3, 1863, which was in force at the time defendant's pleas were filed, which provided that where there was probable cause for the acts done, "or that he acted under the directions of the Secretary of the Treasury, or other proper officer of the Government, no execution shall issue against the collector or other officer, but the amount so recovered shall, upon final judgment, be provided for and paid out of the proper appropriation from the Treasury." Rev. Stat. U. S., p. 185.

The law of 1845 provided for a suit at law; and did not not prohibit an execution. "At common law, a judgment created no lien on the real estate of the defendant."

Shrew vs. *Jones*, 2 McLean, 78.

It can become a lien in New York only in the manner provided by the statute, which required the judgments to be docketed in the clerk's office of the county where the lands are situate.

But where the judgment is rendered for money paid into the treasury of the United States, under the directions of the Secretary of the Treasury, no execution can issue, and the real estate of the judgment debtor is released from the lien. The statute of the United States controls the remedy, and by prohibiting the issue of an execution releases the real estate of the judgment debtor from sale under the judgment

There is no provision of the statute which provides for suits against the successor of collector Redfield. His successor had nothing to do with the original exaction; did not turn the money into the treasury; and is not a privy in law to the defendant.

The character of the suit is determined by the pleadings, to be a suit to recover from the Treasury of the United States, money illegally exacted. The demurrer admitted such an allegation; and the court below erred in disregarding that admission.

Nor would it be a fraud upon the Government, in the light of admitted facts, to enforce the stipulation made by complainants that the judgment should not be a personal judgment. An officer, under instructions, collects an excess of duties. He is allowed no discretion, but is compelled to turn the money over to the United States Treasurer. The statute allows suit to be brought against him to test the legality of his instructions; and provides for a certificate in case of judgment that there was "probable cause," or that he acted under instructions. In such case no execution can issue against him, and the money wrongfully in the treasury must be paid back to the rightful owner.

As a matter of justice this certificate should be granted. It is for the protection of the officer, and for the indemnity of the importer. Each has the right to demand it, and neither party has the right to deprive the other from obtaining such a certificate.

The real defendant, the Government, has no right to delay the bringing of suits by a stipulation that filing the claim waives the statute, and then take charge of the suit, and cut off a trial on the merits, because the stipulation was not in writing.

In such case the duty of the court is purely ministerial and the judge has no discretion.

The decree of the court below allows the nominal defendant to defraud the real complainant. He knew that he had acted in accordance with his instructions, and that no personal action for trespass or tort would lie against him; and that when sued for the duties exacted, he could make no defense as to the legality of the demand. His assurance and that of the Treasury officials, that the filing of the claims stopped the running of the statute, and their admission that the statute of limitations, as a defense, could not be pleaded, was a fraud which the court below should not have sanctioned in the name of equity.

"In a court of conscience, deliberate concealment is equivalent to deliberate falsehood."

In this case we think that deliberate falsehood is, at least, equivalent to concealment.

"Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud."
Crosby vs. *Buchanan*, 23 Wall., 454–457.

"In equity, the right to relief is derived from the suppression or misrepresentation of a material fact." (Per Lord ROMILLY, in *Peck* vs *Gurney*, L. R., [13 Eq.,] 79–113; *Wilcox* vs. *Iowa University*, 32 Iowa, 367.) This view has been applied to innocent misrepresentations in a prospectus, providing that they were of the essence of the contract. (*Smith* vs. *Reese River Co.*, L. R., [2 Eq.] 766; *Kennedy* vs. *Panama Co.*, L. R. [2 Q. B.] 580.) This doctrine is substantially grounded in fraud, since the misrepresentation operates as a surprise and imposition upon the opposite party to a contract. It is inequitable and unconscientious for a party to insist on holding the benefit of a contract which he has obtained through misrepresentations, however innocently made. (1 Story on Eq. Juris., §193, and cases cited; Perry on Trusts, §171.)
Hammond vs. *Pennock*, 61 N. Y., 152.

It is recognized as a ground of equitable interference, that a plaintiff had assured a defendant in a pending suit that no proceedings should be taken without notice to him, thus inducing him to take no steps to interpose a successful defense, and then entered up judgment by default, without notice. It was held.

that "relief upon such a judgment, upon these facts, would have been within the power of a court of equity in this State, upon a bill filed for that purpose."

Dobson vs. *Pierce*, 12 N. Y., 168.

The decision in the law court was that the statute of limitations bound the plaintiff solely, because he had obtained no written stipulation that it would not be pleaded. The decision cut off all relief, on pure legal grounds, but admitted the equities were with plaintiff. Under the facts pleaded in complainant's bill, it is shown that it would be contrary to equity and good conscience to permit the defendant to have judgment on his plea of limitations; and the court below had jurisdiction to adjudge that the verbal stipulations of the defendant and the Treasury officers, which induced complainants not to sue until after six years from the date of the exactions, should be held sufficient to authorize it to restrain defendant from taking any benefit from his plea of the statute of limitations. This is clearly recognized, in principle, in—

N. Y. and Harlem R. R. Co. vs. *Haws et al.*, 56 N. Y., 178.

Marine Insurance Co. of Alexandria vs. *Hodgson*, 7 Cranch, 336.

Crim vs. *Handley*, 4 Otto, 657.

The English rule is well stated in the following case:

"The statute of limitations in this case was not a bar. The rule upon the statute in courts of equity was that where there was no fraud, the statute was binding in a court of equity, as in a court of law. But wherever a title existed at law and in conscience, and the effectual assertions of it at law was unconscientiously obstructed, relief would be given in equity. Equity would remove the bar proceeding from lapse of time, as it would from any other legal advantage, if sought to be used unconscientiously. In equity, the statute therefore did not begin to run until the fraud had been discovered, or might have been discovered."

Ecclesiastical Commissioners vs. *Railway Company*, 4 Chan. Div., 845-868.

Previous to 1839, suits could be commenced against collectors at common law. By the act of March 1839, this right was taken away, and the action for money had and received could not be maintained against a collector on account of illegal exactions.

All claims for refunding illegal exactions had to be made to, and passed upon by the Secretary of the Treasury, until the passage of the act of 1845. By the last mentioned act, persons were allowed to bring suit, and courts were invested with jurisdiction to the extent of *trying the legality and validity of demands and payments of duties.* Under this act no other questions could be tried. The collector was simply a nominal defendant—nothing more. If he collected illegal duties under instructions from the Secretary of the Treasury, he was not in any manner responsible. The suit was not commenced against him except in name. Neither was it commenced to subject his property to the payment of any judgment that might be obtained. The suit was commenced simply to ascertain whether the claim was valid; whether the exaction was illegal.

Under this statute the case must be tried upon its merits. The collector being simply a nominal defendant, could not, in any event, plead the statute of limitations.

There never had been any promise on the part of the collector, either in fact or by implication to refund the money. As soon as he collected the money, the same was turned over to the Secretary of the Treasury. To refund it was out of his power; and a promise on his part to refund it utterly useless and worthless. His promise had no more to do with the transaction than as though he had never been collector.

Neither can it make any difference whether his promise was oral or in writing.

The statute of New York is, that in order to take a case out of the statute of limitations, the promise shall be in writing.

signed by the party chargeable thereby. In no event could the collector be chargeable with the amount illegally collected. for the reason that he had turned the same over to the Secretary of the Treasury, and the law had pointed out the method to compel a repayment. The statute expressly provides that such judgment shall be paid out of the proper appropriation. from the Treasury.

Under the law of 1863, no execution could have issued upon any judgment recovered against a collector, where he had acted under the instructions of the Secretary of the Treasury. And the plea of the statute was not interposed in this case until 1866.

At the time this plea was interposed the collector was not in any way responsible for the payment of a single dollar.

No judgment could have been obtained to his personal prejudice; to its payment his property would not have been subjected. He was not liable for costs, nor was he compelled to defend the action. It was not his duty to employ counsel. He was in the narrowest sense a nominal defendant. He had collected money contrary to law in accordance with the instructions of the Secretary of the Treasury, and had turned this money over in accordance with law (See 13 sec. act 1863.)

The question to be decided by the suit was not whether the collector should pay a certain amount of money, but whether the Secretary of the Treasury should return it. We most cheerfully admit that no word of the collector could determine the rights of either party. It does not depend upon what the collector said or thought, but upon what he actually did.

What did he do? He collected money from the complainants illegally and turned it into the Treasury of the United States.

He did wrong. From this wrong we admit that we can reap no advantage. The Government obtained our money through the wrong of its officers, and we simply ask for the return of that money. If the Government is not responsible for the torts of its officers certainly we are not.

We paid the money under protest—paid it in order to get possession of our goods; and then made our claim in accordance with law.

The then Secretary of the Treasury, James Guthrie, admitted that our claim was just and ordered the collector to forward the proper certificates.

Was it our duty to bring suit then?

Our claim was admitted to be just, and the proper officer ordered to certify the amounts due us. There was no dispute between complainants and the Government as to law or fact. Under such circumstances should suits have been commenced? This was in 1856.

Again in May, 1857, Howell Cobb, then Secretary of the Treasury, admitted that our claims were just, and ordered the amounts to be certified There was then no dispute between the complainants and the Government as to law or fact. Should suit have been commenced at that time?

In July, 1857, Redfield was superseded by Mr. Schell, and in May, 1858, the Secretary of the Treasury ordered Schell to make out the statements of money illegally paid by the complainants at his earliest convenience. There was still no dispute between the complainants and the Government as to law or fact. Should suit have been commenced then?

A few days after this order had been sent to Schell, the Secretary of the Treasury instructed the collector of Boston to include in similar statements all amounts that had been paid illegally since May, 1850. These instructions waived the statute of limitations, so far as Boston was concerned.

In 1859, the attorney of the complainants called upon Mr. Ogden, auditor of the custom house at New York, and was informed by him that the Secretary of the Treasuay had acquiesced in the decision of the courts, and had given instructions to refund the money, and nothing was necessary to prevent the running of the statute of limitations except to file the claims, and that for complainants to commence suits at that time would justify the Secretary of the Treasury in believing that it was done simply to make costs. Mr. Redfield said the same, and acquiesced in all that Ogden said. Not content with this the complainants' attorney, out of extravagance of caution, called upon the Secretary of the Treasury, and he confirmed all that Ogden had said. In addition to this, referred the attorney to instructions sent the collector at Boston, in Sawyer's case. To refer complainants to a letter written upon the same subject, was the same as though the letter had been addressed to them.

The Secretary of the Treasury did not even stop here. He requested complainants not to bring suit, assuring them that the money would be refunded. There was still no dispute as to law or fact. Should suit have been commenced then?

Can the statute commence to run under such circumstances? Does not the law favor compromises and amicable settlements?

Could there have been any propriety in bringing suit until the collector refused to make the statements, or neglected to make them until the neglect amounted to a refusal?

The complainants acted in good faith. The Government has in its possession their money collected contrary to law and against their protest. Three Secretaries of the Treasury admitted that the collections were illegal, and two of them or-

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

OTTO ANDREÆ ET AL.
v.
HEMAN J. REDFIELD.
No. ~~248~~ 22.

APPEAL FROM UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

OTTO ANDREÆ ET AL.
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APPEAL FROM UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Brief for Appellee.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

OTTO ANDREÆ ET AL.
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No. 218.

APPEAL FROM UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE.

STATEMENT.

The complainants, over one hundred in number (112), filed their bill in equity March 11, 1874, against Mr. Redfield, to restrain him from pleading the statute of limitations in bar of sixty suits, pending in said circuit court, brought by the several firms whereof complainants are members, to recover an alleged excess of duties exacted from them upon various importations, made while Mr. Redfield was collector of the port of New York, from 1853 to 1857. The actions at law are enumerated on pages 21 and 22 of the record. The grounds set up for equitable interference are that there was delay upon the part of the auditor and refund clerk of the New York custom-house in settling the amounts to be refunded, awaiting which computation the complainants postponed the bringing of their several actions; though this delay occurred after Mr. Redfield had ceased to be collector (none of these suits being barred when he retired from office, July 1, 1857), and was attributable to the action of his successor, Mr. Schell (Record, 4, bottom, and 5, top); that the complainant's attorney, *after Mr. Schell, then collector, had adopted this course*, applied to S. G. Ogden, auditor at the custom-house, who assured counsel that the presentation of the claims to the refund clerk would prevent the running of the statute against them, and advised that suits be not commenced, lest it should have the effect to prejudice the department against the claims; that this statement and advice was repeated by plaintiff's attorney to Mr. Redfield (not then collector, it will be remembered), who replied that he "no longer had any control over the adjustment of these claims, and, as far as he was concerned, Auditor Ogden had the whole charge of the matter, who must be, from his long experience, familiar with the practice of the department, and the attorney could rely upon the accuracy of Mr. Ogden's statements; and shortly thereafter, at a meeting of the said attorney and said Ogden and said Redfield, said Ogden stated to said Redfield, as he had before to the attorney, that according to the practice of the department, if the plaintiffs had already presented their claims for refunding, or if they would do so, the statute ceased to run from the date of such presentation as effectually as if suit was commenced; and he corroborated his assertions by referring the defendant to decisions of the department to that effect, and at the same time expressed his belief that Collector Schell would yet be persuaded to resume the adjustment; and the defendant thereupon said he saw no necessity for suing on those causes, and if the plaintiffs had presented or would present their claims for adjustment, the statute ceased to run from that time, and could not and would not be interposed as a defense to the payment of them, and he concurred with Mr. Ogden in the expressed opinion that Collector Schell would soon resume the adjustment of them, and that of course these claims would all be paid. (Record, 5, 6.) The Secretary of the Treasury also informed the complainant's solicitor that the statute of limitations "had already *ceased* to run against these claims, and the plaintiff's attorney could assure his clients that it was unnecessary to commence suits, the department having acquiesced in the decisions of the courts" as to the proper rate of duty and given instructions to refund. (Record, 6.)

The complainants say that, relying upon these conversations, they delayed instituting proceedings for a long time, but finally brought the sixty suits aforesaid; to which, among other pleas, Mr. Redfield interposed that of the statute of limitations. (Record, 6, 7.)

The bill then exhibits correspondence between the Secretary of the Treasury and the collector of Boston; the report of Mr. Jordan, the Solicitor of the Treasury, to the Secretary; the letter of Mr. Jordan to the complainant's attorney, and various other documents and proceedings believed to be wholly impertinent to the real merits and law of this case, and therefore not any more fully stated. (Record, 7 to 9.)

The prayer of the bill is to have Mr. Redfield perpetually enjoined from pleading the statute of limitations in bar of these sixty suits at law, and that he be directed to withdraw the pleas, already filed, &c. (Record, 10.)

A temporary injunction, pending the hearing, was ordered and continued; but, after argument upon demurrer to the bill, the injunction was dissolved, the demurrer sustained, and a decree entered dismissing the bill with costs. The parties thereupon bring the case here.

BRIEF.

Without stopping to discuss any question of form or jurisdiction, such as the multifariousness of the bill or the competency of sixty persons to unite their separate claims so as to make up together an amount in controversy sufficient to bring the subject to your attention, &c., the broad ground is taken that, upon the facts alleged, there is no equity in the bill.

I.

Unless the statute so declares, its operation cannot be prevented *at law* by proof that the cause of action has been *fraudulently* concealed by the defendant. Maxwell on Stats., 6, 7, and cases there cited; Imperial Gas Company *v.* London Gas Company. (10 Exch., 43.)

Revised Statutes, section 721, is a literal re-enactment of the judiciary act of September 24, 1789, c. 20, § 34: "That the laws of the several States, except where the Constitution, treaties, and statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." (1 Stats., 92.)

In Harpending *v.* Dutch Church (16 Peters, 493), this court declared itself "bound to conform to the decisions of the State courts of New York in the construction of their acts of limitation. Such is the settled doctrine of this court." Green *v.* Neal (6 Peters, 291); Porterfield *v.* Clark (2 Howard, 125).

The statutes of New York provide that where an action proceeds upon the ground of fraud, the lapse of time is to be computed from its discovery; but fraud in, or the fraudulent concealment of, a cause of action *ex contractu* does not interrupt or delay the running of time against the suit. Their courts have always and repeatedly so declared. Troup *v.* Smith (20 Johns, 43 *et seq.*, per Spencer, C. J.); Allen *v.* Mille (17 Wend., 202, per Nelson, C. J). So in other States. Smith *v.* Bishop (9 Verm., 110); Fee *v.* Fee (10 Ohio, 469); Clark *v.* Reeder (1 Spears (Law), 405, *et seq*).

Indeed, if fraud would take a case out of the statute, there would be no occasion for equitable interference; but this fact could be replied to the plea. But if the legislature has made no such exception the court cannot engraft it upon the statute. See cases cited *supra ;* also McIver *v.* Ragan (2 Wheaton, 30); Bank of Alabama *v.* Dalton (9 Howard, 528, 529); French *v.* Spencer (21 Howard, 238, middle).

If a court of equity interferes in any way to remove the bar of the statute, it is only upon the ground of FRAUD. "Equity, in giving relief in such cases, must do it *solely* upon the principle of relieving against fraud." 2 Story Eq. Jur. (12th ed.), § 1521, note 1; 20 Johns., 47; 9 Vt., 110).

Was Mr. Redfield guilty of any *fraud ?*

The only statement attributable to him, as making it unjust to allow him to file this plea, is that, long after he ceased to be collector, upon hearing the law laid down by the auditor, he remarked that, assuming the legal proposition to be correctly stated, the statute "*could* not and [therefore] would not be interposed as a defense," &c. (Record, 6, top).

This was, obviously, neither intended nor understood as a promise not to exercise the right of pleading the statute; but an acceptance of the legal accuracy of the statement that it could not avail in the cases stated. If this proposition of law was correctly assumed the pleas cannot injure the plaintiffs, *if they have put themselves in the position indicated*, by duly presenting their claims; for they would then only have to reply that fact. If that view of the law was erroneous, which is thought to be very clear, the plaintiffs cannot set up their own ignorance or mistake of the law, and that of Mr. Redfield, as depriving him of his right to plead the statute. This statement, however, would show that no fraud was intended or practiced.

Equity does not interfere to rectify the consequences of a mistake of law. Lord Irnham *v.* Child (1 Bro. Ch. Cas, 92); Bank *v.* Daniel (12 Peters, 32); Pullen *v.* Ready (2 Atk., 591); Shortwell *v.* Murray (1 Johns. Ch., 515); Storrs *v.* Baker (6 Johns. Ch. 170); Champlin *v.* Laytin, (18 Wend., 407); Marshall *v.* Collett (1 Y. & C., 232); Denys *v.* Shuckburgh (4 Y. & C., 42); Jeed *v.* Bishop (25 L. J., Exch., 110); Midland Railway *v.* Johnson (6 Ho. of Lds., 798, 811).

The original statement by Mr. Ogden was not made as Mr. Redfield's authorized agent, nor until that gentleman had ceased to be collector. The complainant's solicitor communicated it to Mr. Redfield, who said if this statement of the law was correct, the statute could not, and therefore would not, be pleaded.

II.

The New York code provides (§ 110) that no barred cause of action shall be revived except by some writing signed by the party.

The court of appeals authoritatively declare that a verbal promise not to plead the statute, relying upon which the statutory period is allowed to expire, cannot have any effect, as an estoppel or otherwise. Shapley *v.* Abbott (42 N. Y., 443). This case in 42 N. Y., 443 *et seq.*, seems decisive of the present.

III.

If ever entitled to relief, the complainants' laches, in omitting for nearly eight years after the pleas were filed to apply for it, would prevent it being given now.

IV.

Either these suits at law must be treated as against Mr. Redfield personally, or against the United States; not, as is attempted, against both jointly, or partly against one and partly against the other.

If against Mr. Redfield, then he is not affected by all the conversations, statements, letters, &c., of various officers of the government, occurring long after he ceased to be collector.

If against the United States, none of the customs or revenue officers mentioned had any right or power to stipulate away their legal rights, much less to estop the government by casual remarks about their understanding of the law.

The record in this case (p. 23, folio 47, p. 25, folio 51) contains the remarkable order and stipulation that a temporary injunction be ordered, provided the plaintiffs agree that a certificate of probable cause shall be granted; and that in no event shall the judgment be enforced nor execution issue against Mr. Redfield or his property.

That is, if the United States is deprived by Mr. Redfield's unauthorized act and assertion of a perfect defense to these suits, the government, and not the individual, must suffer all the injury accruing from this act and assertion, though done and made long after he ceased to be an officer!

This arrangement, however, we think hardly worth considering, so confident are we that the court will find that there was never anything more than a mere acceptance by Mr. Redfield of the statement of Auditor Ogden that the filing of the importers' claims with the refund clerk, &c., would take them out of the statute; which was of itself but an expression of Mr. O.'s opinion of the legal effect of such action, or how it would be treated by the Treasury Department.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.

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Supreme Court United States.

OCTOBER TERM, 1878.

OTTO ANDREAE ET AL., APPELLANTS,

vs.

H. J. REDFIELD'S EXEC'RS, RESPONDENTS.

In Equity.—No. 22.

Petition for Rehearing,

BY

R. G. AND E. C. INGERSOLL, AND A. W. GRISWOLD,

Counsel for Appellants.

WASHINGTON, D. C.:
Taylor, Printer, 833 Twentieth Street,
1878.

Supreme Court United States.

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PETITION FOR REHEARING.

And now come the appellants in the above-entitled cause and respectfully petition this honorable court and the honorable Chief Justice and Associate Justices thereof for a rehearing and reargument of said cause for the following reasons, and upon the following grounds, to wit:

1st. Because by the opinion and judgment of the court heretofore given and rendered in said cause, they believe they are deprived of their just rights and of any relief at law or in equity.

2d. Because the privity of the United States, as a defendant, is an admitted fact in the record, and this admission was overlooked by the court.

3d. Because the court misapprehended the nature and effect of the pleadings in the court below, and also misapprehended the facts admitted by the demurrers of the defendant.

4th. Because the court failed to follow the well settled rule in the state of New York, in regard to the statute of limitations, the statute of frauds, and estoppel, and based its opinion on the questions of estoppel and want of consideration & in in the case of *Shapley* vs. *Abbott*, 42 N. Y., 443, which has been over-ruled on those points.

5th. Because under the rulings of the courts of New York, and of this court, the case as made by the pleadings was within the equity jurisdiction of the court below, and it had full power upon the equitable terms imposed, to enjoin the defendant from taking any benefit from his judgments on the plea of the statute of limitations.

We submit the following suggestions for a rehearing:

I.

THE PRIVITY OF THE UNITED STATES.

The United States is the party interested in these suits as the real defendant, and allowed itself to be sued in the name of the person exacting the illegal duties, and required the Secretary of the Treasury to adjust and pay these claims without suit, and in the event of suit to defend the suit and pay the judgment where the exactions were made under the orders of the Secretary of the Treasury, or with probable cause.

The law of 1845, Sec. 12 of the law of August 16, 1856, (11 Stat., 50), and Sec. 12 of the law of March 3, 1863, (12 Stat., 741), establish the privity of the United States as a party interested in the suit, though not a party to the record, with the nominal defendant.

The pleadings aver this privity, "that the counsel defending said actions against your orators is employed by the Treasury department and at the expense thereof," and the demurrer admits it. The case is defended in this court by the Attorney General, who comes here solely under the authority of Sections 359 and 361 Revised Statutes of the United States, because this is a case "in which the United States is interested."

By examining the record, the court will see that in the law cases, the defendant filed as his third plea the statute of limitations. That the plaintiffs, citing the act of March 3, 1863, replied, that "said Secretary of the Treasury, within six years next before the commencement of this suit, did undertake and promise to pay the said several sums of money in the complaint of the said plaintiffs mentioned; and the said plaintiffs further say that the said defendant did, during the time he was such collector of the port of New York, pay over to the United States the moneys exacted by him as collector, from these plaintiffs, and by them paid to him, as in said complaint mentioned, on the condition, trust and agreement that the United States should and would undertake and assume to bear and be responsible for all claims that should be made against him, as such collector, for moneys received and exacted by order of the Treasury department."

"That the moneys so paid by these plaintiffs to the said defendants, as in said complaint mentioned, *were so exacted.*"

"*That this suit is, in fact, defended by the United States.*"

* * * *

They further replied that within six years prior to the commencement of this suit, and before the expiration of six years from the exaction of those moneys, the Secretary of the Treasury officially promulgated, made known, promised and agreed to and with plaintiffs, that the statute of limitations should not be pleaded as to any claims for refund of money so officially collected within six years prior to 1856, when a test suit in such cases had been commenced, the Secretary having acquiesced in the judgment for the importers in those cases.

The defendant, the United States, in the name of Redfield, demurred to this replication. The demurrer admitted:

1st. That within six years prior to suit, the Secretary of the Treasury, who had custody of this money, and who alone under the law could refund it, had promised to repay it

2d. That the moneys had been exacted and received by his orders.

3d. That admitting his legal duty to repay the same, in place of the defendant, he had promised, in writing, over his signature, that the statute of limitations should not be pleaded to any claims accruing after 1850.

4th. That the United States is the real defendant, the party to be charged. * * * *

The law court, on these admitted facts as to the privity of the United States with the defendant, and that the defendant acted under orders of the Secretary of the Treasury in making the exactions, and in paying them into the Treasury, and that the Secretary of the Treasury had promised in writing within six years of the commencement of these suits to repay these duties so exacted, held the defendant's demurrer to the plea was good.

This court in the opinion filed in this case admits that if the person acting as collector exacted these moneys under the orders of the Secretary of the Treasury, the suit is in the nature of a suit against the United States, thus admitting the privity of the collector with the Secretary of the Treasury and the United States. We aver that the collector acted under orders in making the exaction, that after protest, we demanded refund of the duties; that the Secretary of the Treasury acknowledged the justice of the demand and ordered the defendant, Redfield, on filing of the claims to make certified statements of the sums due.

These and other averments, admitted by the demurrer, established the privity, which under the rulings of this court, made the suit on the law side of the court below a suit against the United States, and by the reason of the rule it made the defendant, Redfield, simply the representative of the United States, entitled to plead no defenses, which the Secretary of the Treasury was estopped from pleading. The law court elected to treat the case as a purely personal suit, and held to be bad the replication of a new promise by the party to be charged.

After this ruling appellants sought to correct it by recourse to the equity side of the court, and filed this bill, alleging more fully the fact that Redfield was defending purely in a representative capacity, that the suit was a suit against the United States, that the United States had agreed within six years prior to the commencement of the suit at law to repay these duties so exacted, that the Secretary of the Treasury was estopped from interposing the defense of the statute of limitations.

The court below, in granting the temporary injunction required a stipulation that "neither of the plaintiffs shall in any event issue execution, or enforce said judgment in any way against said Redfield or his property." Judge Smally thus held the suit to be against Redfield in a purely representative character; and appellants filed the required stipulation on the 30th day of April, 1874.

The opinion of Judge Woodruff sustaining the demurrer of defendant, rules that the defendant had the right to plead the statute of frauds as a personal defense because he had made no promise in writing not to waive the statute of limitations, thus ignoring the representative character of the defendant, and refusing to recognize as binding on the plaintiffs the stipulation filed to waive recovery for a tort against Redfield, and to regard the suits as suits for money had and received by the United States for their use.

II.

MISAPPREHENSION OF THE PLEADINGS AND OF FACTS.

The opinion of this court is based on a misapprehension of the facts stated in the bill and admitted by the demurrer. The court say:

"Viewed in the light of these several suggestions, it is clear that the several claims of the complainants were never prepared and presented *as required*, to the Secretary of the Treasury for adjustment and allowance, but the complainants allege that they were induced to delay such preparation and presentation by the recited official representations and others of like import." (P. 4, Opinion.)

After alleging the rulings of the Secretary of the Treasury and his orders for refund as "having established your orator's rights to the return of the excess of moneys so paid by them severally for duties," they aver that it was necessary for them to make "statements in detail of the various importations including the names of the vessels by which such importations were made, and the dates of their arrival, to the auditor in the New York custom house;" and that they "*diligently attended to so much of the business as was to be attended to on their part* and before November 1st, 1859, all the bills of particulars of the claims of your orators were fully presented in each case before said auditor in the custom house for adjustment."

Page 4, *Printed Record.*

Instead of alleging that complainants were induced to delay preparing and presenting their claims for adjustment, as stated by the court, they allege that they did all they were required to do.

The official letter of Secretary Guthrie of October 4, 1856, required the defendant, on application of complainants to prepare certified statements to be forwarded to him.

The letter of May 27, 1857, from Secretary Howell Cobb required such statements in all cases, where duties had been exacted in error on commissions.

The letter of May 21, 1858, of Secretary Cobb, requires collector Schell to follow the instructions of the letter of October 4, 1856. This letter is a recognition of the fact that the claimants had done their duty, and that the collector had not done his duty.

The court say further:

"They never did prepare and present their claims to the Secretary of the Treasury for allowance, as required by the alleged rules of the department."

The bill alleges that under the ruling of the department, the statute of limitations ceased to run against a claim for the refund of duties if the claim was filed with the collector of customs within six years after the exaction; that in the latter part of 1859, the Secretary said to their attorney, "*that under this latter ruling of the department the statute had already ceased to run against these claims.*" Page 6, Printed Record.

This is a distinct admission that the complainants had complied with every requirement of the department alleged in the bill as necessary on their part for the presentation of their claims; it is also an admission that the Secretary was satisfied with the sufficiency of their acts as a bar to the running of the statute of limitations.

The process of adjustment is shown in the affidavit of James T. Griswold, who says: "Upon these instructions being promulgated, a large number of claims for return of such duties were presented to the collector and came to the desk of deponent as refunding clerk; orders for the invoices and entries were endorsed thereon and checked by the auditor, and the lists sent to the record office for the papers to be got up and brought down to defendant to enable him to make the adjustment; some of these claims were adjusted, certified, and transmitted to the Treasury department, and were paid. * * That among these claims presented in 1857, 1858 and 1859, which remained unadjusted at the time deponent left the office in 1861, he recognizes those of the plaintiffs in the sixty several suits commenced against Heman J. Redfield in May, 1864."

Pages 19, 20, *Printed Record.*

This affidavit shows that the complainants did their duty, filed their claims in apt time, and that the delay was that of United States officers.

It was the practice of the New York circuit court in 1856, to render judgment as to the law in these custom cases, "the amount of the judgments to be adjusted at the custom house;" and when the Secretary of the Treasury settled the law of the case, and provided that the amount should be adjusted at the custom house, his action was as conclusive upon the Government as the judgments referred to.

III.

ERRORS AS TO THE RULE IN NEW YORK.

The court seems to construe the New York statute of limitations as requiring an express promise in writing by the defendant that he would not plead the statute of limitations, to remove the bar of the statute.

It is sufficient under Section 110 of the Code to prove an acknowledgment in writing at any time within six years before suit is brought, that the debt is due, made by the party to be charged thereby.

It is alleged by the bill, and admitted by the demurrer, that the proper officer of the United States, who, by law, is charged with the payment of these demands, had, within six years prior to the commencement of these suits, admitted in writing that these claims were just and should be paid; and also that he admitted in 1859, in writing, that moneys exacted as these moneys were exacted, were debts of the United States, and that all moneys so exacted from 1850 to 1859 were debts taken out of the statute of limitations.

It is admitted by the demurrer that the plaintiffs, while the defendant was collector, applied for a refund of these moneys, that the demand was valid, that the principal, the Secretary of the Treasury, and the agent Redfield, both admitted its validity, that the principal ordered the agent to receive and adjust the claims, and promised to pay them as fast as adjusted; that most of these claims were filed with the agent, and others with his successor in the agency: that the orders of October 4, 1856 and May 27, 1857, were received by the agent while an officer, and he in part executed them. This shows as strong a case of acknowledgment of the debt as if the Secretary of the Treasury had made a part payment, with the knowledge and assent of his agent, on these claims within the six years. As held in *Munro* vs. *Potter*, 34 Barb., 361, "he had an agency coupled with an interest."

"The law implies a new promise to pay a debt, barred by the statute of limitations, from a mere acknowledgment of a subsisting obligation."

"Grant that he was an agent; that does not relieve him from the knowledge and approval of an act done by the principal for his benefit. He was an agent, and more too. He had an interest, and was competent, although acting as an agent, to approve and ratify the act in question, as having been done for his benefit, as well as that of the principal.

"In my opinion, therefore, he was bound by the acknowledgement which the act indicated, and which he participated and approved of at the time it was done. As the act was done for his benefit, it will be assumed that he approved of it."

Ibid. pp. 362, 363.

Reaffirmed in *Miller* vs. *Talcott*, 46 Barb., 171

This rule leaves no doubt as to a new promise having been made by the Secretary of the Treasury to repay these claims before six years had run against them, and while Redfield was in office; and that promise was in full force when the act of March 3, 1863 was enacted.

While that promise was in full force, and Redfield was still liable to suit, unless these claims were paid, the order of May 21, 1858, to collector Schell was issued. Defendant knew of this order, and that it was for his benefit.

He was as to these claims still in privity with the Secretary of the Treasury. The right to sue him does not lapse when he ceases to be collector. Nor does the collector's right lapse to plead that he acted under orders of the Secretary of the Treasury, or to have any judgment rendered against him paid by that officer. To hold that they do lapse with the exit from office, would enable the Secretary of the Treasury to order the exaction of illegal duties to the extent of millions of dollars, to remove his agents and remit the importers to a personal suit and judgment against his agents. Such a construction of the law would be unjust and unreasonable.

The privity of the Secretary of the Treasury with the officer or person exacting money under color of office was recognized by the law of 1845, and by that of March 3, 1863. The United States acknowledged that privity by defending the suits at law and in equity in the court below, and by appearing and defending in this court.

It was competent, therefore, for the Secretary of the Treasury in 1856, 1857, 1858 and 1859 to acknowledge the existing liability of the United States to repay this money, as this was done for the benefit of Redfield, and was made by the party to be charged with the debt.

This is sustained by the rule in *Harper* vs. *Fairly*, 53 N.Y., 444, that the effect of a part payment in taking a case out of the statute of limitations depends wholly upon the reason of the decisions, and, "the reason is that a part payment made on account of a claim is an acknowledgement by the debtor of his liability for the whole demand, and from this acknowledgment, a new promise on his part to pay the residue is implied."

The court held further, that the part payment must have been made "by the party to be charged with the effect of it, or an agent authorized thus to charge him." Parol proof to prove the assent of the party to an endorsement made by another party was held admissible. The same rule is sustained in *First National Bank* vs. *Bailey*, 49 N. Y., 158.

The Secretary of the Treasury in equity and in law is a privy with the officer who paid him the money of claimants, as fully so as the sureties in any injunction bond; and the rule in New York is that judicial proceedings affect privies as well as principals.

Methodist Churches of N. Y. vs. *Barker*, 18 N. Y., 465.

Howe vs. *Buffalo, New York & Erie R. R. Company*, 37 N. Y., 298.

The acknowledgment of the Secretary of the Treasury in May 21, 1858 and in 1859, that these demands were just and should be paid so soon as his clerks could certify the amounts, and that under his rulings the statute ceased to run from the filing of the claims, were sufficiently evidenced by writing to bring them within the rule in—

McNamee vs. *Tenny*, 41 Barb., 506.

Brown vs. *Keach*, 24 Conn., 73.

Edmonds vs. *Gooter*, 9 Eng. Law and Eq., 203.

The Secretary of the Treasury having acknowledged the indebtedness to complainants, and having agreed to pay the demands, for the benefit of defendant, Redfield, it was a ruling of the Secretary which bound his successor. The successor of Secretary Guthrie was bound by his admissions, and repeated the instructions of his predecessor. No successor undertook to reverse his ruling, allowing these claims as liabilities of the Treasury, until after suit brought.

This court held in ***Kendall*** vs. ***Stokes***, 3 How., 98, that the Postmaster General "committed an error in supposing that he had a right to set aside allowances, for services rendered upon which his predecessor in office had finally decided."

Justice McLEAN in the dissenting opinion, refers to the case of ***United States*** vs. ***Bank of Metropolis***, 15 Pet., 400, and says:

"And the decision is clear and unequivocal against the power of the Postmaster General to supervise the allowances and contracts of his predecessor."

> ***Kendall*** vs. ***Stokes***, 3 How., (15 Curtis Cond. Repts., 313.)

Under Section 110 of the Code of New York, it is sufficient to aver that the party to be charged had promised within six years to pay these demands, and this is the proper averment in a replication to the plea of the statute.

> ***Bank of Orange Co.*** vs. ***Haight***, 14 Wend., 83.

The case of ***Shapley*** vs. ***Abbott***, 42 N. Y., 450, is not like the case at bar.

The plaintiff was defeated in that case, because he did not prove a written acknowledgment of the debt within six years before suit was brought.

In our case the pleadings admit a written acknowledgment by the Secretary of the Treasury within six years.

In that case the plaintiff replied estoppel to the plea of the statute. The court held the plea of estoppel bad because there was no consideration for the agreement, and that to produce an estoppel there must be fraud.

We show a consideration to Redfield in delaying suit, in the way of complete exoneration of payment of the debt and a waiver of a suit for the tort, and a consideration to the Secretary of the Treasury in the saving to the Government of the costs of a suit.

"The waiver of the tort is a sufficient consideration to sustain a promise to pay for the use of the boat."

Beadle vs. *Whitlock*, 64 Barb., 298.

The case of *Shapley* vs. *Abbott* is not a correct statement of the law in New York on the question of estoppel.

Had the plaintiff in that case been assured that the debt would be paid as soon as the clerks of a bank named could certify the account, after deposit of the claim with it, and had the plaintiff acted upon that assurance, the bank officers saying, 'we will pay the claim as soon as it can be done according to the formal rules of our establishment,' and the plaintiff had so acted, and forbore suit for a long period of time, both parties assuring him the adjustment would soon be made, the court would have held that the forbearance to sue was sufficient consideration for a new promise to pay the debt. This rule is sustained by later cases.

"There is no disagreement as to the general definition of an estoppel *in pais*. It is agreed that there must have been some act or declaration of the plaintiff or of its agent to the defendant's assignors, which so affected the conduct of the latter to their injury as that it would be unjust now to permit the plaintiff to set up the truth of the case to the contrary of its mistaken act or declaration."

"In *Man. & Trad. Bk.* vs. *Hazard*, 30 N. Y., 226, it is said that it is not necessary to an equitable estoppel that the party should design to mislead. Be this *dictum* or rule, we do not find that it has been in this state disputed or questioned."

"And we hold that there need not be upon the part of the person making a declaration or doing an act, an intention to mislead the one who is induced to rely upon it. There are cases in which parties have been estopped, where their acts or declarations have been done or made in ignorance of their own rights, not knowing that the law of the land gave them such rights. Here, certainly, there could be no purpose to mislead others, for there was not the knowledge to inform the purpose, and both parties were equally and innocently mislead. (***Storrs*** vs. ***Barker***, 6 J. C., 166). ***Indeed it would limit the rule much within the reason of it, if it were restricted to cases where there was an element of fraudulent purpose.*** In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped. And it has long been held, that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. (***Gaylord*** vs ***Van Loan***, 15 Wend., 308). There are decisions where the rule has been stated as the plaintiff claims it. We have looked at those cited by it. It was not necessary to the conclusions of the court in those, that such restriction should be put upon the rule, and we do not think that the language employed was used with the intention of making such a limitation, for the facts of the case did not require it."

Continental National Bank vs. *National Bank of the Commonwealth*, 50 N Y., 581, 583.

In the list of cases referred to by the court as cited in that case and which are over-ruled so far as in conflict with it, we find cited the case of *Shapley* vs. *Abbott*, 42 N. Y., 443, 448. Not content with the statement of the law of estoppel, the court held further that "an acquiescent reliance upon the defendant's statement was an alteration of the plaintiff's position." That "it is as damaging to rely in quiet upon an untrue statement, to the neglect of using the means of recovery, as it is to rely upon an untrue statement, and by action thereon meet with loss irreparable." *Ibid*, 586. Re-affirmed in *Voorhis et al.* vs. *Olmstead et al.*, 66 N. Y., 118.

That case is parallel to this. We relied upon the statement of the defendant and of the Secretary of the Treasury, each corroborating the other, that by the rule of the department, when claims for refund were filed within six years of the date of the exaction, the statute ceased to run from the filing of the claim in favor of the collector or of the Government. Your claims are just, said both officers, and they will be paid after they are filed, just as soon as official red-tape will permit. File them, and a written order for their adjustment will be made, and that order, by the rules of the department, takes the case out of the statute of limitations—it being a written continuous acknowledgment of the debt.

Acting upon this statement of the usages and rules of the department, and the assurance that the statute, in case of suit, could not and would not be pleaded, appellants filed their claims, forbore to sue, waited nearly six years for the Secretary of the Treasury to adjust the claims, and then put them in suit.

"Here there was injury to one party, and benefit to the other, either of which is sufficient to furnish a consideration for a promise."

Marston vs. *Sweet et al.*, 66 N. Y., 212.

This decision over-rules the *Shapley* vs. *Abbott* case, on the question of want of consideration, and is sustained by—

White vs. *Baxter*, 71 N. Y., 259, 261.

"When one, acting on the faith of a promise, performs the condition upon which the promise was made, the promise attaches to the consideration so performed and renders the promisor liable. After the promisor has had the benefit of the consideration for which he bargained, it is no defense to say that the promisee was not bound by the contract to do the act."

"Injury to the promisee is a good consideration, even in the absence of benefit to the promisor." *Ibid.*

These cases over-rule the case of *Shapley* vs. *Abbott*, in regard to a promise not to plead the statute of limitations being a *nudum pactum*, on the ground that injury to the promisee is sufficient consideration.

They re-affirm the rule in *Utica Ins. Co.* vs. ***Bloodgood***, 4 Wend., 656, and *Gaylord* vs. *VanLoan*, 15 Wend., 310, that an agreement not to plead the statute of limitations is valid, if acted on.

Suspension for the time being of the right to sue is held a good consideration for a promise in—

Hendrick vs. *Lindsay et al.*, 3 Otto., 148.

See also—

Violett vs. *Patton*, 5 Cr., 150.

Piatt's Admr. vs. *United States*, 22 Wall., 507.

IV.

EQUITABLE RELIEF.

Under the rulings of the New York courts and of this court, a court of equity can give relief.

In the law court the defendant put in a plea of the statute of limitations. The plaintiff replied a new promise and estoppel. The defendant did not plead the statute of frauds—*that the new promise was not in writing as required by the Code*—but demurred. The court below sustained the demurrer as a bar to the action. The plaintiffs filed their bill in equity to enjoin this judgment as unconscionable, and set up facts as to the real parties, and the promises and statements made by the real and nominal defendants as an estoppel to the plea of the statute. The defendant again demurred and the court held the plea of a new promise and of estoppel invalid under the statute of frauds.

Had the suit been in the State court, the court would not have permitted the United States to set up the statute of frauds.

The State court would have found that the person acting as collector, having taken the money for the use of the United States, and the Secretary of the Treasury having charge of the money exacted, and charged by law with the defense of the suit and with the payment of the judgment, if any, was the real party to be charged with the repayment of this money. That the pledges, written and oral, made for his own benefit, and that of the ex-collector, were within the cognizance of a court of equity; and that he would not be allowed for himself or for the nominal defendant, to put in a plea of the statute of frauds under the circumstances shown in the bill. That having contracted with the assent of the collector, to adjudicate and pay these claims, after due presentation at the custom house, and having agreed that the statute of limitations ceased to run against them after such presentation, a New York court, sitting as a court of equity, would have compelled the specific performance of this agreement, on proof that the complainants had performed their part of the contract. We call the attention of the court to the rule in *Ryan et al.* vs. *Dox*, 34 N. Y., 311, 312, on the powers of a court of equity, and the rule as to the statute of frauds. "He interposes," says the court, "the statute of frauds as a shield, thus using a statute designed to prevent frauds, as an instrument whereby one can be perpetrated with impunity. This a court of equity cannot tolerate."

"Where one of the parties to a contract, void by the statute of frauds, avails himself of its invalidity, but unconscientiously appropriates what he has acquired under it, equity will compel restitution; and it constitutes no objection to the claim, that the opposite party may happen to secure the same practical benefit, through the process of restitution, which would have resulted from the observance of the void agreement." *Ibid* 319.

This right is expressly reserved to the complainants by the decisions of this court.

"No one, for instance, would hesitate to say that, according to the English Chancery practice, a bill to enjoin a judgment at law, is an original bill in the chancery sense of the word. Yet this court has decided many times, that when a bill is filed in the circuit court, to enjoin a judgment of that court, it is not to be considered as an original bill, but as a continuation of the proceeding at law; so much so, that the court will proceed in the injunction suit without actual service of subpœna on the defendant, and though he be a citizen of another state if he were a party to the judgment at law."

Minnesota Co. vs. *St. Paul Co.*, 2 Wall., 633.
Freeman vs. *Howe et al.*, 24 How., 460.
Bank vs. *Turnbull & Co.*, 16 Wall., 195.

The same rule is re-affirmed in *Jones* vs. *Andrews*, 10 Wall., 333, the court endorsing the ruling of Justice Story in *Dunlop* vs. *Stetson*, 4 Mason, 349, that "The court itself possesses the power over its own judgments by staying execution thereon; and it would be very inconvenient if it did not possess the means of rendering such further redress as equity and good conscience required."

These decisions sustain the order of the court below in granting an injunction, especially as the defendant secured a stipulation that if a judgment should be rendered, no execution under it should issue against the defendant, Redfield, or his property. This is sustained by the rule in *Veazie* vs. *Williams*, 8 How., 161. The decree of the court below over-ruling this order and dismissing the bill was in violation of the rules of equity, whether determined by the decisions of the State courts or of this court.

For the foregoing reasons, and for other reasons that may be presented upon a rehearing, we most urgently and respectfully pray this honorable court to order a rehearing in the said case and to re-instate the case upon the calendar.

All of which is respectfully submitted.

R. G. AND E. C. INGERSOLL,
ALMON W. GRISWOLD,
Counsel for Appellants.

8 Otto p 240
Oct 7. 1878

Supreme Court United States.

EX-PARTE SCHWAB.

BRIEF FOR RELATOR.

MATT H. CARPENTER,
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Thomas McGill & Co., Law Printers, Washington, D. C.

In the Supreme Court United States.

EX-PARTE SAMUEL SCHWAB.

Case.

The case is briefly this:

Proceedings were commenced in the United States District Court at Detroit in bankruptcy.

The ordinary warrant issued, commanding the marshal to seize and deliver the property of the bankrupt to the assignee.

The warrant was properly executed as to the property in the bankrupt's possession. Other property not in his possession, but in the possession of the relator, was claimed to have been transferred to him, in fraud of the bankrupt law. The creditors indemnified the marshal, and he seized the property, took it from the possession of the relator, and delivered it to the assignee; and the assignee sold the property under the order of the Bankrupt Court, and brought the funds into court, where they now remain.

Thereupon the relator brought his action of trespass against the marshal, and the creditors who had actively participated in taking the property from his possession, to try the title to the property. That action was defended by the defendants thereto in the State court, and resulted in a judgment in favor of the relator for the value of his property.

The defendants then moved for a new trial, which was ordered by the court, and the case was set for trial October 8, 1878. Thereupon, on the 7th day of October, the defendants in the action in the State court joined with the assignee in bankruptcy, and filed their bill on the equity side of the Circuit Court of the United States for that district, setting forth the pendency of the action at law in the State court, impeaching the relator's title to the property, and praying that the sale to him might be adjudged fraudulent and void under the bankrupt law; praying for an injunction to restrain proceedings in the action in the State court; praying that if the relator be found to have any title, that he might be compelled to receive the avails of the sale of said property by the Bankrupt Court, and for general relief. Upon this bill the Circuit Court issued an injunction enjoining further proceedings in the action at law in the State court.

Subsequently the State court vacated the order granting a new trial in the action at law in the State court, and ordered execution to issue on the judgment after fourteen days.

The result of these proceedings is, that the relator has obtained a final judgment in a State court of general jurisdiction for the value of his property, in an action to which the marshal and creditors made defense by attempting to impeach the relator's title, from which judgment no appeal on writ of error has been taken; but his execution is met by the injunction of a Federal court, issued in a suit commenced in that court subsequent to the commencement of the action at law in the State court.

POINTS.

I.

It is conceded, that where a Circuit Court of the United States is proceeding in the exercise of its proper and legitimate jurisdiction with a suit in equity, no matter how erroneous may be its proceedings within its jurisdiction, this court can only interfere upon an appeal taken subsequent to a final decree. But we claim that whenever the Circuit Court is acting outside of its jurisdiction, this court may restrain it.

We understand it to be settled by the adjudications of this court, that this court has a supervisory control over inferior Federal courts, as full and broad as that of the King's Bench over the inferior judicial tribunals of England; at least *to confine such inferior tribunals within the limits of their jurisdiction.*

5 Pet., 190, *Ex-parte* Crane.
7 Wall., 377, *Ex-parte* Bradley.
9 Wheat., 530, *Ex-parte* Burr.
19 Wall., 505, *Ex-parte* Robinson.
1 Wall., 69, *Ex-parte* Dubuque R. R.
19 How., 13, *Ex-parte* Secomb.

This doctrine has been contested by dissenting opinions in this court; but the cases stand unreversed.

Now, if we can show that the issuance of the injunction in this case was more than an erroneous act performed in the exercise of proper jurisdiction, and was an act entirely beyond the power of the Circuit Court to perform, then it was an act in excess of jurisdiction, and this court will interfere by mandamus, especially because such interference of this court is the only means by which actual collision between the Federal and State courts can be prevented.

It may, be that in some cases, where the *power* of this court to interfere is undoubted, yet the court in its discretion might decline the *exercise* of such power, upon the ground that no substantial injury would result; but in a case like this, the duty of this court is commensurate with its power. If this court has the power to issue this mandamus, it *will* not be doubted that it is its duty so to do, and thus prevent a conflict between the Federal and State courts.

II.

We claim—

(1.) That the Circuit Court had no jurisdiction whatever of the suit commenced by the bill in equity; that the bill in equity on its face informed the court that the controversy presented by the bill was pending in the State court in a suit previously commenced between competent parties.

(2.) But if the court shall be against us on the first point, and hold that the Circuit Court had jurisdiction of the suit commenced by the bill, still we claim that the issuance of the injunction in this case was an act beyond the jurisdiction of the court, or, to quote from Chief Justice Marshall, "in *excess*" of its jurisdiction. And we shall discuss these questions in the order above stated.

First. The court had no jurisdiction of the suit commenced by the bill. No authorities need be cited to show that where a Federal and State court have *concurrent* jurisdiction of a controversy, the court which first gets possession of it has the *exclusive* jurisdiction to determine it. Therefore, when the bill was filed in the Federal court, if it showed that the matter in dispute was already in litigation in the State court between competent parties, then it showed a case over which the Federal court had no jurisdiction.

It is perfectly clear that the dispute or matter in controversy in both cases was the same. In the action at law, the question was whether Schwab had acquired a good title to the property in question. It would have been a perfect defense to his action, if the creditors could have shown that the sale to him was in fraud of the bankrupt law. The case made by the bill presented the same question. Therefore, the bill showed a case over which the Federal court had no jurisdiction; unless the fact that the assignee was not a party defendant in the action at law, but was one of the complainants in the suit in equity, alters the case.

When a bankruptcy proceeding is commenced, the parties to it at first are the creditors as actors and the bankrupt as defendant, and it is well settled that before the election of an assignee, the creditors may bring a suit in equity to set aside a conveyance or transfer in fraud of the bankrupt law; and that after the appointment of an assignee, he may be substituted in their place as complainant in such suit.

Clark *v.* Clark, 17 How., 315.
Hood *v.* Harper, 5 N. B. R., 355; Cadwallader, J.
Ex parte Fendley, 10 N. B. R., 250; Blatchford, J.
Irving *v.* Hughes, 2 N. B. R., 62; McCandless, J.
Johnson *v.* Price, 13 B. R., 523; Brown, J.
Re Smith, 1 N. Y. Leg. Ob., 240.
Re Brians, 4 Benedict, 152.
Re Ulrich, 8 B. R., 15; Blatchford, J.
Blackburn *v.* Stanward, 5 Law Rep., 250.
Jones *v.* Leach, 1 B. R., 595.
Re Donaldson, 1 B. R., 595.

The action at law was commenced by Schwab in the State court, against the marshal and the creditors who indemnified him for the trespass, before the appointment of an assignee in the bankruptcy proceeding. The action at law was defended by the same attorneys who appear as solicitors and counsel in the bill in equity in the Federal court.

No attempt was made to remove the cause from the State to the Federal court, either upon the ground of citizenship or subject matter. But the marshal and the creditors defended the suit upon the ground that the transfer of the property to Schwab, under which he claimed title, was void, being fraudulent under the bankrupt law. So that the real controversy in both these suits was whether Schwab's title was valid or void.

In Memphis City *v.* Dean, 8 Wall., 65, this court held that

> "A question which is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party, and raising a new question as to him along with the old one as to the former party. The old question is in the hands of the court first possessed of it, and is to be decided by that court."

That case was an attempt to escape a State court and find refuge in a Federal court, upon the ground that the suit in the Federal court added a new party and a new question as to him. The case at bar is much stronger against the Federal jurisdiction than that was, because here no new question is raised, and the new party (the assignee) was the representative of all the parties defendant in the action in the State court.

For these reasons we contend that the bill in equity in this case showed on its face that the Federal court had no jurisdiction; that the bill was demurrable for that reason, and the Federal court was wholly without jurisdiction in the case; and that every act done and order made by the Federal court in that suit was *coram non judice.*

Second. But if the court shall be against us on the first point, still we claim that the order of the court granting an injunction to the State court was *coram non judice.*

There is some difficulty, where a court is conceded to have jurisdiction of a suit, in drawing a precise line between these orders or decrees which are merely erroneous, and those which are *coram non judice* and absolutely void. But such line sometimes has to be drawn, and this court has given an example.

In *Schriver's Lessee* v. *Lynn et al.*, 2 Howard, 43, the case was this: Certain property had been decreed to be sold by a trustee, but the trustee, in making the sale, had sold a piece of property not included in the bill, nor in the decree. But the entire sale was reported to the court, and the court confirmed it. And the question was, whether such confirmation was an error in the exercise of the jurisdiction of the court, valid until reversed, or whether it was absolutely void, and could be attacked collaterally? And this court held that it was absolutely void.

In *United States* v. *Arradondo*, 6 Pet., 709, and again in *Grignon's Lessee* v. *Astor*, 2 How., 338, this court has defined jurisdiction as follows:

> "The power to hear and determine a cause is jurisdiction * * * * * . If the law confers the power to render a judgment or decree, then the court has jurisdiction." (2 How., 338.)

From this it follows, that what a court has no power to do, if it be done, is done without jurisdiction; and whatever is done without jurisdiction is void.

The true rule would seem to be this: That where a court has jurisdiction of a cause pending before it, and whether it can make a particular order or not depends upon general principles of law, as to which different minds may honestly differ, it is merely *an error* to decide wrong. But where a statute absolutely forbids a court to do a particular thing,—in other words, where a statute in express words denies to a court the power to do a particular thing,—the doing of that thing is doing a thing the court has no power to do, and therefore beyond its jurisdiction to do.

To illustrate: Every judicial court has general power to punish for contempt. But an act of Congress forbids any Federal court to punish as a contempt an act not committed in its presence, or by resisting its process, &c. Now, suppose a Federal court should assume to punish some act as a contempt which the statute forbids it to treat as such. No one would doubt, we presume, that judgment to that effect in such a case would be absolutely void, and not merely erroneous; and for the reason that the court lacked the power—that is, jurisdiction—in that instance; while its general power to punish contempts not forbidden would be conceded.

Now, while we concede that a Circuit Court, sitting as a court of equity, has the power generally to issue injunctions in suits pending before it, and that when it grants an injunction which this court thinks on the state of facts ought not to have been granted, because this court differs in opinion in regard to the general principles of law applicable to the question, the order granting the injunction would be merely erroneous; still, we contend that where a Circuit Court issues an injunction which a plain, positive statute forbids it to issue, then the injunction so issued is absolutely void. That is, although the general power to grant injunctions remains with the court, the power to grant the particular injunction is excepted out of the general powers, and what is excepted out of the powers of a court to do, if done, is done beyond its powers, and without its jurisdiction, as surely as it would be if an act of Congress should forbid a Circuit Court to grant an injunction in any case whatever.

The Circuit Courts are creatures of the statute. They have no jurisdiction, as this court has, derived directly from the Constitution. This court has repeatedly decided that Congress may confer upon a Circuit Court such power as it pleases, and make such exceptions as it pleases to the general powers granted. The original judiciary act forbade Circuit Courts, *in suits between citizens of different States*, to entertain a suit on contract in favor of an assignee, where the assignor could not have brought suit in the Federal court. This court sustained that exception, upon the ground that although it was the duty of Congress to create courts empowered to exercise the entire judicial power of the Federal government, yet, inasmuch as Congress had not done so, in creating the Circuit Courts, having denied them jurisdiction in this particular case, they could not exercise such jurisdiction.

The Revised Statutes, section 720, provides as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The only law which can be claimed to authorize an injunction under section 720, is section 5106, which protects the bankrupt himself from proceedings against him on claims provable in bankruptcy.

So we respectfully submit, that the granting of the injunction by the Circuit Court in this case was not merely an error, but was an act which the court had no power to perform, and was, therefore, as completely outside of its jurisdiction as though no suit had been pending before it.

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of Counsel for Relator.

#3. Original

IN THE

Supreme Court of the United States.

EX-PARTE SAMUEL SCHWAB.

Brief of Don M. Dickinson, for Relator.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

EX-PARTE SCHWAB.

Application for Mandamus to Compel Order to Vacate Injunction Staying Proceedings in State Court.

FACTS.

On March 4, 1878, relator purchased of one *J. W. Smith & Co.*, for full value, a stock of clothing valued at from $5,000 to $8,000.

On March 14, 1878, a petition in bankruptcy was filed in the District Court of the United States for the eastern district of Michigan against one *Schott & Feibish*, and a provisional warrant of seizure issued to take the property of *Schott & Feibish*.

On March 29, 1878, after having seized a large quantity of property belonging to *Schott & Feibish*, the petitioning creditors claimed that the goods so as aforesaid purchased by relator and in his possession had belonged, and should be held, as a part of the assets of the bankrupts. Being aware, however, of relator's claim of title and of his adverse possession, they gave the marshal an indemnifying bond, directed him to seize the goods, and he did take them, notwithstanding full notice of relator's claim, and against the protest of relator's storekeeper. The marshal took the goods by force.

That after demand made of the marshal on *April* 27, 1878, relator commenced a suit in the Superior Court of

Detroit against Henry Michaels, Bernard Rothschild, and Ferdinand Hayes of Rochester, N. Y., petitioning creditors, who were active in said seizure, and against Christopher R. Mabley of Detroit, who aided them, and Solomon S. Matthews, who was the marshal who made the seizure; the action being trespass on the case in trover.

On *May* 6, 1878, Joseph L. Hudson was elected, qualified, and invested assignee of the estate and effects of *Schott & Feibish.*

Nine days after the election of assignee, on *May* 15, 1878, all the defendants appeared and pleaded to the merits in the trover suit; issue was joined; the cause was placed upon the docket of the Superior Court, for trial at the July Term, 1878.

The cause was then tried, and a judgment entered for the plaintiff July 12, 1878.

The defendants moved for and obtained a new trial, and the cause was placed upon the docket for the October Term of the State court, *and assigned for trial for* October 8, 1878, which was Tuesday.

On October 5, 1878, which was Saturday, *the defendants in said trespass suit* join with them the bankruptcy assignee of Schott & Feibish, (Hudson,) and file in the CIRCUIT Court of the United States for the eastern district of Michigan a bill in equity, wherein they appear as complainants, and Samuel Schwab, the relator, is made a defendant.

A preliminary injunction is forthwith issued from said *Circuit Court*, ordered by the district judge, restraining the "*Said Samuel Schwab and his attorneys from the further prosecution of the suit described in said bill as pending in the Superior Court of Detroit, in relation to the property in said bill described*, *or from the further prosecution of any suit in the State courts for the subject-matter of said suit.*"

This injunction is served on the relator's attorneys, and *is filed* in the Superior Court on the day before the cause was assigned for trial.

On the next motion day in the Superior Court, October, 12, 1878, that court, in view of the injunction, vacated the order for new trial, reinstated relator's judgment, but ordered a stay of execution thereon for two weeks.

On October 28, motion for further stay of execution is denied absolutely in the Superior Court, so that the record of that court stands upon an order for execution.

On November 12, 1878, the Federal (Circuit) court, after hearing, issued the final injunction, of the tenor and effect above quoted, except that it refers directly to the State suit as follows:

> "That you do absolutely desist and refrain from the further prosecution of a suit pending in the Superior Court of Detroit, wherein Samuel Schwab is plaintiff and Salmon S. Matthews, Christopher R. Mabley, Bernard Rothschild, Henry Michaels, and Ferdinand Hayes are defendants, * * or from the prosecution of any other or further suit in the State courts, in regard to the seizure by Salmon S. Matthews and his deputies of said goods described in said declaration of said plaintiff, Samuel Schwab, &c."

The same attorneys appear for the defendants in the trespass suit, and for the complainants in the equity bill.

The bill sets up, on information and belief, a charge of fraudulent transfer of goods by *Schott & Feibish* to one *J. W. Smith & Co.;* and then, on information and belief, charges a transfer to relator, with notice of or as a party to the fraud.

Although the transfers are named as with intent to defeat the bankrupt act, yet the fraud set up in the bill makes out a transfer voidable at common law, and not necessarily by the bankrupt act.

The only equity set up in the bill on which a stay of the State suit can be asked, is "*That the question in regard to the fraud so attempted by the bankrupt and by the plaintiff in said suit, to wit, Samuel Schwab, cannot be determined without* *the aid of this court, and that said questions cannot be litigated, tried, and determined in the State court.*"

And "*That the suit so commenced does impede and delay the settlement of the estate.*"

It appears further that the assignee has taken and sold the goods, for which suit is brought without any notice whatever to the relator. And the prayer of the bill is, that if the relator "*claims any title, lien, or interest therein, he proceed to establish the same in this court,* or *in the District Court, wherein said bankruptcy matters are pending.*"

It might have added: "And if it shall turn out that said Samuel Schwab has been outrageously wronged, his property taken from him without process, his common-law remedy enjoined, and himself used up in litigation, whereby he has been greatly damaged, then that he be forever foreclosed of his remedy therefor, and that he do take what was received by the trespassers, at their sale of his goods after keeping them six months, and that he do thereafter hold his peace.

Brief for Relator.

We present the following points in their order:

I. This court has jurisdiction to interpose by mandamus, and the case presented is a proper one for the exercise of that jurisdiction. (Page 5.)

II. The issuance of the injunction is forbidden by a proper construction of section 720 of the Revised Statutes. (Page 8.)

III. The State court had exclusive jurisdiction of the action brought by the relator, because it is the remedy contemplated by the bankrupt act for a trespass, damages for which could not be recovered in the Bankruptcy Court. (Page 10.)

IV. (1) In any event, the jurisdiction of the State court was concurrent; and (2) that jurisdiction was not taken away by the Revision. (Pages 14 and 25.)

V. If concurrent, the State Court jurisdiction of the controversy became exclusive, as it first attached. (Page 30.)

VI. The English statute and rule, even where the power to enjoin is given. (Page 36.)

I.

This court has jurisdiction to interpose by mandamus.

In *Ex-parte Crane*, 5 Pet., 190, Marshall, C. J., quotes Blackstone as follows: "That it issues to the judges of any inferior court, commanding them to do justice according to the powers of their office, whenever the same is delayed. For it is the peculiar business of the Court of King's Bench to superintend all other inferior tribunals, and therein to enforce the due exercise of those judicial and ministerial powers with which the crown or the legislature have invested them; and this not only *by restraining their excesses*, but also by quickening their negligence, and obviating the denial of justice."

The opinion of Mr. Justice Baldwin, *dissenting*, in this case, is an exhaustive history of the writ, and shows that it originally issued *to compel obedience of officers and courts to the statutes of Parliament.*

In *Ex-parte Bradley*, 7 Wall., 377, this court says: "The ground of our decision * * * is, that the court below '*have no jurisdiction* to disbar the relator for a contempt committed before another court. *The contrary must be maintained before this order can be upheld and the writ of mandamus denied.*

"*No amount of judicial discretion of a court can supply a defect or want of jurisdiction in case the subject-matter is not before it; the proceeding is coram non judice, and void.*"

The court quotes with approval the language above cited from Blackstone, (3 Blackst. Comm., 111;) and also quotes *Bacon's Abridgment*, title Mandamus, (letter D, p. 273,) "to restrain them [inferior courts] WITHIN BOUNDS, and compel them to exercise their jurisdiction." *Ex-parte Bradley* is affirmed in *Ex-parte Robinson*, 19 Wall., 505.

Ex-parte Burr, 9 Wheat., 530, Marshall, C. J.: "It [this court] could only interpose on the ground that the Circuit Court had clearly exceeded its powers." See, also, *Ex-parte Secomb*, 19 How., 13.

Ex-parte Dubuque R. R., 1 Wall., 69: This court ordered the court below to *vacate and "erase"* an order for a new trial, because it had *exceeded its powers* in granting it.

If the writ of *prohibition* were within the jurisdiction of this court by the same grant as the writ of *mandamus*,—that is, if this court could issue it in cases warranted by the "principles and usages of law," (sec. 13,) and was not restricted to cases arising under the maritime law,—then a writ of mandamus might issue in every case to vacate an act which might have been prevented by *prohibition*.

The same rules apply to the use of the writ of prohibition within the grant of the power—*i. e.*, maritime jurisdiction—as to the use of mandamus.

They are writs of the same nature and order. The court would not interfere by prohibition or mandamus in a matter of discretion, or *where the inferior court was proceeding within its jurisdiction*, except on appeal; but the position taken by us here was sustained in *United States* v. *Peters*, 3 Dall., 121.

This was a libel in admiralty in the District Court, and it was claimed that the libel on its face showed jurisdiction in another and foreign court. (N. B.—There was no attempt to interfere with the *res* by the District Court.) Application was made to this court for a writ of prohibition.

It was insisted that prohibition was not the proper remedy, but that the question should be brought up by plea to the jurisdiction, judgment, and successive appeals.

Held a proper case for the writ.

In that case there can be no doubt that the case *could* have been reached by appeal, but, as the inferior court was proceeding without jurisdiction, it was a case for that remedy.

See ***Phillips' Pr.***, title Mandamus, p. 230.

This court has adopted that construction of section 3 of the judiciary act which confers upon it as broad a jurisdiction to issue the writ as that possessed by the Court of King's Bench.

Whenever the act complained of is in the discretion of the court, the writ will not lie; but if without it, and without the power of the court, it will lie.

It was previously granted to compel courts and officers to obey the statutes of Parliament.

For the preservation of harmony and good government, a statute is passed here prohibiting the granting of such injunctions. The remedy to be applied here, is to enforce compliance with the legislative will—the law of the land—in the matter of granting injunctions, and not to obtain a reversal of a decree.

How else can this law be enforced?

The mischief sought to be prevented by the statute, and by the enforcement of the statute, is the effect of the injunction,—not the effect of a decree. There is no appeal from the order for injunction.

Where is the remedy, except by mandamus from this court?

It will not do to say that there is a remedy by appeal.

The statute does not merely contemplate that there shall be no injunction in cases where final decree shall at some time be in favor of the jurisdiction; or that there may be an injunction in cases where the party enjoined wins the suit in the court below; or where the case in which an injunction issues never reaches the stage of final decree. ***It forbids****, and takes the jurisdiction away to issue the injunction,* *as an independent act, standing out clearly from the other proceedings.*

The mischief is the injunction. This court may never be called upon to review the order issuing it, even if final decree should be entered against the relator below,—for the reason, that a decree can be entered in this cause without a final injunction; while the error alleged, and which the legislature provides against, *is this interlocutory injunction.*

Or the decree may be, that the transfer to the relator is fraudulent and void, and that the property belonged to the estate, without an injunction. *If the decree be held valid,* then it can be made the basis of a complete defense to the judgment in the State court, either by new trial, or as the basis of an equity bill in that court for relief from the judgment. So that the injunction is not necessarily a part of the record which this court would review.

After all, we come right back to the unassailable position: There can be no enforcement of the statute which prohibits this preliminary or interlocutory injunction by the Circuit Courts, except by mandamus from this court, in cases where such Circuit Courts violate the statute. This court may express an opinion on some future appeal that the inferior court did wrong; but it will not then be able to apply the remedy, which would have been to vacate an *interlocutory* order during its existence, which had its life, served its only purpose for good or ill, and died its natural death, without aid from this court, before the final decree from which, and not till which, the record could come here.

II.

The injunction is forbidden by section 720, which is as follows:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction *may be authorized by any law relating to proceedings in bankruptcy.*"

The provision does not assume that there is any such law; it certainly does not imply that injunctions may be issued whenever a question arises under the bankrupt law, and it will be seen hereafter that the words "proceedings in bankruptcy" have a perfectly defined technical meaning, referring to the cause in bankruptcy.

The learned judge below concedes that "*literally*" the power to issue injunctions in such a case is excluded by this provision.

With great deference, we submit that there is no canon of construction by which the *letter* of a statute of this nature can be departed from, unless it be in very exceptional cases, where such a construction would lead to absurdity and nonsense. We submit the following, as showing a few of the repetitions of this well-settled rule:

> "It would be going too far to make exceptions which the legislature has not made."
> *M'Iver* v. *Regan*, 2 Wheat., 25.

> "The only sound principle is to declare *ita lex scripta est*, to follow and to obey. Nor if a principle so just could be overlooked, could there be well found a more unsafe guide or practice than mere policy and convenience."
> *Story's Confl. of Laws*, p. 17.
> *Sedg. Stat. Con.*, p. 265.

Says the Supreme Court, in ***Priestman*** v. ***United States***, 4 Dall., p. 30:

> "Of those rules of construction, none can be more dangerous than that which, distinguishing between the intent of the words of the legislature, declares that a case not within the meaning of the statute, according to the opinion of the judges, shall not be embraced within the operation of the statute, although it is clearly within the words; or, *vice versa*, that a case within the meaning, though not within the

words, shall be embraced. We should invariably deem it our duty to defer to the expression of the legislature, to the letter of the statute, when free from ambiguity and doubt, without indulging in speculations either upon the impropriety or hardship of laws."

Sedgwick says, at page 266:

"It has been said that it is a safe and wholesome rule to adopt the restricted construction of a statute, where a more liberal one will bring us in conflict with the fundamental law."

Statutes by which extraordinary powers are conferred on courts, must be strictly construed. (Id., 299.)

It will hereafter be seen that the courts have uniformly held that the avoidance of conflict between Federal and State courts tends to the preservation of the fundamental principles of our peculiar form of government.

This injunction running against the plaintiff, is within the meaning of the statute forbidding the stay of suits at law in State courts.

Dyer *v.* Reynolds, 96 U. S., 340.
4 Cranch, 179.
7 How., 612.
13 Wall., 679.

III.

The State court had exclusive jurisdiction of the action.

When the marshal seizes property in the possession of a third person, and claimed by him, whether under color of summary process from the Bankruptcy Court or without process, willfully or through mistake, he is a trespasser. He and those directing him become liable to an action in any court having common-law jurisdiction, and thereafter no court of concurrent jurisdiction can interfere with that suit once commenced.

In *Doyle et al.* v. *Sharpe*, in the New York Court of Appeals, reported in the New York Weekly Digest, vol. 7, No. 9, October 21, 1878, at page 205, the court affirming General Term, *held*, "That the provision of the bankrupt act (sec. 40) under which the goods were seized relates to property which belongs to the judgment debtor, and such as is in his possession, and over which he exercises control, and cannot be extended in its operation so as to embrace property belonging to or in possession of another person, which such person claims to own, or in regard to the ownership of which a serious dispute exists, *even if it is alleged that such property has been transferred in violation of some provision of the bankrupt act*;" citing

Re Holland, 12 B. R., 403.
16 Minn., 426.
Smith *v.* Mason, 14 Wall., 419.
Marshal *v.* Knox, 16 Wall., 551.
12 B. R., 188, 479, 860.
18 Minn., 414.

In *Marsh* v. *Armstrong*, 20 Minn., 81, (S. C., 11 B. R., 125,) the Supreme Court sustained the action against the marshal, his defense being that he seized by virtue of the warrant.

Re Marks, 2 N. B. R., 575. An injunction to restrain such a suit was refused, it being held that the marshal was responsible. (See analysis of case at page — of this brief.)

1 *Lowell*, 525. Injunction to restrain such a suit refused. (See page — of this brief.)

See also 3 B. R., 329; 4 B. R., 392, to the effect, that if the marshal take the bond of indemnity, the Bankruptcy Court administers the property as estate of the bankrupt, and cannot take notice of outside rights, unless presented by the claimants.

We say, that when the creditors indemnify, they indemnify for all purposes. They say, "We guarantee you that the title to the property is in the bankrupt. Go on and administer as such." They certainly can claim no equitable relief at the expense of the claimant, who has been despoiled, on the ground that they have made a mistake. "If, acting in his capacity as marshal, he wrongs a citizen of a State, he is individually answerable, *and in her courts.*" Quoted with approval by Marshall, C. J., 9 Pet., p. 600.

Fully to same effect, *Buck* v. *Colboth,* 3 Wall., 334. The bankrupt law gives no peculiar immunity to the wrongdoer.

Marshal v. *Knox,* 16 Wall., 551. In this case, the assignee himself, under color of an order from the District Court, took possession of property, the title to which was conceded to be in the bankrupt.

The court held in that case, quoting Smith *v.* Mason, "that strangers to the petition in bankruptcy, who were not served with process, and had not voluntarily appeared and become parties to the litigation, cannot be compelled to come into court under a petition to show cause." And it was held that the assignee was a mere trespasser.

In this case, the possession has been taken from an adverse claimant, who was not party to the proceeding in bankruptcy, by the marshal, without any process whatever—in a case where it is contended that not only the right of possession but the right of property was in the plaintiff.

The court distinctly held, in the case of Marshal *v.* Knox, that the person whose possession was invaded by the assignee, even where the right of property was conceded to be in the assignee, could at his option bring an action of trespass for damages.

The court say:

> "But it may, with some plausibility, be said that as the property in this case is conceded to be in the bankrupt, and the question has respect only to the right of possession under the lien, the District Court, which has express jurisdiction of the 'ascertainment and liquidation of the lien and other specific claims on the bankrupt's property, might as-

sume control of the property itself.' The claim, however, is to the right of possession; and that right may be just as absolute and just as essential to the interest of the claimant as the right of property in the thing itself, and is in fact a species of property in the thing, just as much as the subject of litigation as the thing itself. It is the opinion of the court, therefore, that the case is not substantially different from that of Smith *v.* Mason."

Smith v. *Mason*, 14 Wall., 419. There, the assignee obtained possession of a fund under color of an order of the District Court in a summary proceeding. The court declined to go into the question of merits, or into any other question than to determine that the party in whose possession the fund was claimed title to it, and held that it could not be divested except by due process of law.

As the court say, "The exercise of any other jurisdiction or remedy is unnecessary, as the act provides the assignee a convenient, constitutional, and sufficient remedy to contest any adverse claim made by any person to any property in the second section." Before the appointment of an assignee, proceedings in a plenary suit, to protect the property in this condition, may be instituted by the petitioning creditors.

See numerous cases cited:

Bump, 10th ed., p. 331.
Hood *v.* Harper, 5 B. R., 358.
In re Marter, 12 B. R., 185.
Johnson *v.* Price, 13 B. R.,* 523; and cases cited.

In *Knight* v. *Cheney*, 5 B. R., 305, the assignee sought to dispose of property in the possession of a third person, claimed by him to have been transferred to that third person in fraud of the bankrupt act; and based his claim to dispose of the property upon that provision of the act which provides that the District Court may dispose of property which has come into possession of the assignee, "*or which is claimed by him*," where it appears to the satisfaction of the court that the title to the same is in dispute.

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*NOTE.—The word "trustees," in first line of the reported case, should read "creditors." It is a misprint.

Justice Clifford uses this language:

> "Discretionary power, it must be conceded, exists in the District Court to order a sale of the estate of the debtor, where it appears that the title is in dispute, if it also appears that the debtor was in possession of the estate at the time that he was adjudged bankrupt, and that the estate was duly transferred to the assignee, and that it remained in his possession at the time the sale was ordered. * * *
>
> "Taken literally, the phrase, 'or which is claimed by him,' would perhaps appear to afford some support to the theory of the assignee; but it is impossible to adopt that view, as it would authorize the district judge, in the settlement of the estate of a bankrupt, however small, to order the sale of the estate, if claimed by the assignee, of every inhabitant of his judicial district; to direct the assignee to hold the funds received from the sales, in place of the estates sold; and to compel the owners in possession of the same to appear in court and vindicate their titles, and to accept, if successful, the proceeds of the sale as the value of their property. Adopt that theory, and the Constitution, which was ordained to establish justice, becomes a mockery, as any man may be deprived of his property without due process of law, and no man, where the title to property is concerned, is entitled to a trial by jury, unless he commences his action before the court orders the sale. Such a thing, as applied to the facts of this case, is not only repugnant to the Constitution, but also to many other provisions of the bankrupt act, and especially to the third clause of the second section of the act, which contemplates that such controversies shall be prosecuted by an action at law or a suit in equity."

IV.

(1.) *The jurisdiction of the State is concurrent: and* (2) *That jurisdiction is not taken away by the Revision.*

In this case, if we are not entitled to maintain an action of trespass, then, gauging its jurisdiction by the claims of the assignee or of the marshal as to what constitutes the property of the debtor, the Bankrupt Court would draw to itself the determination of the title to every item of property in the judicial district. The only foundation of the jurisdiction, as ascertained by these complainants, is the claim of the marshal and of the creditors, that the property of this stranger belongs to the bankrupt's estate.

Not assuming to bring their action by plenary suit, they have, by a much more summary proceeding, taken the property of the one who claims it adversely, without the color of process or the sanction of any court; and, acknowledging the risk and chances of their act, they indemnify the marshal against an action which is subsequently brought against him and those instructing him.

They appear and defend the action; allow the claimant to proceed and prepare for trial; and after many months, when the claimant has shown his wrong in a tribunal of which "it is not to be presumed that embarrassments would be encountered in the way of a prompt and fair administration of justice," (Lathrop *v.* Drake, 91 U. S., 516.) they now file their bill to restrain the action which they invited.

Sustaining our position is the decision of Mr. Justice Nelson in *In re* Bonesteel, 3 N. B. R., p. 517.

In Rogers *v.* Winsor, 6 N. B. R., p. 246, which was an application by the assignee for books and papers, who alleged that they were transferred fraudulently, the court sustained the following positions as being insuperable, after reviewing the decisions:

> "Until the conveyance shall be shown to have been fraudulent, and therefore void, the respondent's right to the books and papers in question is as perfect to all intents, as against the assignee, as the right to any chattels in his possession inherited from his grandsire, or purchased in open market fifty years ago."

And upon the point, as to the manner in which that conveyance can be shown to be fraudulent, so that the assignee has a right to possession, he says:

> "The law, as now settled in Knight *v.* Cheney and Smith *v.* Mason, forbids a court's assuming to pass upon the conflicting claims of the petitioner and the respondent to either the absolute ownership or the possession of the books in question, until its judgment shall have been invoked by a bill in equity or action at law, in which the validity of said conveyances can be tested upon bill, answers, and proofs, or upon issues to a jury."

That notwithstanding the charge of fraud, the claimant "was legally in the possession, undisturbed and unquestioned, of the books, papers, and evidences of debt which the assignee is now seeking to wrest from him, not by due process of law, but by a course of proceeding never to be favored, *nor even to be allowed.*"

It is needless to cite the long course of decisions upon this question. And the only question, it seems, here is: Whether after the law has been so settled that an assignee, who is the receiver of the court, cannot, with the countenance and authority of the Bankruptcy Court behind him, take possession of property which is held or claimed adversely, without being liable as a trespasser, the United States marshal and petitioning creditors in a bankruptcy case can, *without any process or color of process, or sanction of any court behind them, take property so held in the possession of a third person, with entire immunity from the consequences of the seizure: and this where an action for the wrong has been contemplated and indemnity given against it?*

Valliant (*Assignee, &c.*) v. *Childrass*, 21 Wall., 643. Petition in bankruptcy filed February 18, 1868; in April and June, 1868, decrees were obtained in suits, and sales of bankrupt property made September 17, 1868. The adjudication of bankruptcy was made February 27, 1868, and, as the court say, "about seven months before the sale under the State decrees took place."

It was contended by the assignee that the sale under the decree was void, because the State court had no jurisdiction, the District Court having exclusive jurisdiction to "liquidate the liens and specific claims" on the estate, after adjudication of bankruptcy.

The court, Hunt, Justice, delivering the opinion, says: "Where the power of the State court to proceed in a suit is subject to be impeached, *it cannot be done*, except upon an intervention by the assignee, who shall state the facts and make the proof necessary to terminate such jurisdiction. This rule gains, whether the four months' principle is applicable, or whether it is not applicable."

He quotes with approval the following, in Kent *v.* Downing, 44 Ga., 116 (10 N. B. R., 538):

> "The assignee may, on his own motion, be made a party, if for no other reason than to have it properly made known to the court that the defendant has become bankrupt. He also has a right to move to dismiss the attachment. The adjudication of bankruptcy must be made known to the court in some authentic mode. It may be denied, and the State court cannot take notice of the judgment of other courts by intuition."

If this is the rule even as to property actually vested in the bankrupt, and to which no title adverse to the assignee is claimed, and it be held that the State court's jurisdiction cannot be divested, except by an application to that court, how much more forcible is the reason of non-interference with the State jurisdiction, when the action is one for damages against the marshal, which does not involve any interference with the custody of the property?

There is cited, in the last opinion, also the case of Samson *v.* Burton *et al.*, in the District Court of Vermont, 4 N. B. R., 1.

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Here the jurisdiction of the Bankruptcy Court was invoked, by bill in equity, to arrest litigation pending in the State court, and to hear and determine the controversy involved, on the ground that the Bankruptcy Court had jurisdiction to "adjust the various priorities and conflicting interests of all parties."

The court, Shipman, J., very fully considered the case.

The prayer of the bill was to restrain the party from proceeding in any manner in the State court, until after the question of the bankrupt's discharge was settled, and then that this court, by an issue to a jury, or some other mode of trial, proceed to settle and adjust the claims.

The court held that

> "It had no authority to withdraw the case from the State court, and proceed with the trial here." * * * "The assignee has a right to be substituted as a party in the place of a bankrupt." * * * "*Those actions are under the parties and the subject-matters, and it must determine the questions as they arise according to the law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by the State tribunal. In no other way can its decision be reversed or revised.*"
>
> "If a clause of the bankrupt act is drawn in question, and a right or claim set up under it in the State court, it is bound by its authority, and if it disregards it, its judgment can be reversed." * * * "If such a transfer is in fraud of the bankrupt act, though not in conflict with the practice hitherto prevailing in the courts of the State, the bankrupt act must prevail as the paramount law and prevent the transfer. This being a matter which has arisen *puis darien continuance*, it can still be set up by the assignee in the State court; and if the judgment of the latter be against the rights of the creditors under it, it can be subjected to a writ of error, taking the case from the Supreme Court of the State to the Supreme Court of the United States, the only court which has the power of reversing the final decision of the highest court of the State."

See also p. — this brief, cases as to injunctions staying proceedings in State court.

Johnson (assignee) v. *Bishop*, 1 Wool., 324. The plaintiff, assignee in bankruptcy, brought detinue in the Bankrupt Court against the sheriff, for goods held by him under an attachment which had beed dissolved by the commencement of proceedings in bankruptcy, within four months, under section 14.

So that, in the language of Mr. Justice Miller, it appeared to the court in the case that "The title to the goods attached vested in the assignee as soon as the assignment to him was executed, and with the title he acquired the right of immediate possession. This possession he could recover in a court of justice; but to what court should he apply? Had this property been in the possession of a party who could not shelter himself behind the jurisdiction of a court of law, undoubtedly the Federal court would have had jurisdiction of the case." And the question determined by Mr. Justice Miller was: "Does the fact that at the time the bankruptcy proceedings were instituted the property was in the hands of the sheriff, under attachments issued out of the State courts, deprive the Federal court of its jurisdiction?"

The court says: "This general principle has been acted upon in England in many cases in which two courts of concurrent jurisdiction were sought to be brought into collision."

Payne *v.* Drew, 4 East, 523.
Evelyn *v.* Lewis, 3 Hare, 472.
Russell *v.* East Anglien R. R. Co., 3 McNaughton & Gordon, 104.

"By this salutary rule, harmony is maintained between the several superior courts of law and chancery which have coëxtensive and concurrent jurisdiction in a great variety of cases. The importance of the rule, and of scrupulously obeying it in this country, is greatly increased by the fact that the Federal and State courts, although exercising their jurisdiction in the same territory, over the same subjects, and often the same classes of litigants, draw their existence from different sources, and are to one another foreign tribunals."

The principle is the same, it will be seen from this case, whether the subject-matter of the litigation be the thing itself, or any other subject or cause of action; that the court which first obtains jurisdiction of the subject shall retain it and decide every question connected therewith.

The case decided by Mr. Justice Miller is important, in that it makes no distinction between cases arising under the bankrupt law and those where the jurisdictions may conflict without reference to that law. He bases his decision upon authorities like

Hagan *v.* Lucas, 10 Peters, 400.
Peck *v.* Janness, 7 Howard, 612.
Pullman *v.* Osborne, 17 Howard, 471.
Taylor *v.* Carryl, 20 Howard, 583.
Freeman *v.* Howe, 24 Howard, 450.
Ex-parte Robinson, 6 McLean, 355.
Ex-parte Dorr, 3 Howard, 103.
Buck *v.* Colbath, 3 Wall., 334.

This (1 Wool., 324, *supra*) is a strong case, inasmuch as it is admitted that the attachment was dissolved, that the title was in the assignee, and that the jurisdiction of the State court had ceased, and the decision rests upon the broad principle of the right and exclusive control of the State court of the subject-matter of the suit which it has once taken cognizance of, and of deciding for itself that it has no jurisdiction.

Says the court: "It [the State court] should be informed in a proper way of those proceedings before its possession is interfered with or assailed. Information of these facts, in some proper pleading, must be communicated to the court." * * * "Nor is there any foundation for the idea that the Federal courts have exclusive jurisdiction of such suits in behalf of the assignee. Neither the fourteenth section, which gives him the right to sue for and recover the estate, debts, and effects of the bankrupt, nor the first section, which fully defines the jurisdiction of the District Court, declares it to be exclusive in this class of cases." * * * "*And if the State courts fail to recognize his [the assignee's] legal rights, a presumption not here to be indulged, he can, in the proper mode, bring the case from the highest court of the State to the highest court of the United States.*—Peck *v.* Janness, 7 Howard, 612."

The judgment of the District Court, dismissing the suit for want of jurisdiction, was affirmed.

Eyster *v.* Gaff, 91 U. S., 521.

It was there decided, that a State court might proceed to judgment without noticing the bankruptcy proceedings, if the assignee did not cause his appearance to be entered, or proceed against him if he did appear, even in a case where the bankrupt was a party defendant.

The principle is the same, and is so applied, when the suit is commenced after the proceedings in bankruptcy are instituted. So that the fact of the existence of the suit prior to the proceedings in bankruptcy, cuts no figure in the principle laid down.

Claflin v. *Hauseman*, 93 U. S., 131, *infra*.

Says this court, in *Eyster* v. *Gaff*, 91 U. S., *supra*:

"The court, in the case before us, had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governs such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in any other court, however seriously they might have affected the rights of parties to the suit already pending.

"It was the duty of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matters of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. It is almost certain, that if at any stage of the proceeding before sale or final confirmation, the assignee had intervened, he would have been heard to assert any right he had, or set up any defense to the suit. The mere filing in the court of a certificate of his appointment as assignee, with no plea or motion to be made a party or to take part in the case, deserved no attention, and received none." * * *

"The opinion seems to have been quite prevalent in many quarters at one time, that the moment a man is declared a bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the Circuit Courts have concurrent jurisdiction." * * *

"The debtor of a bankrupt, or the man who contests the right to real or personal property with him, loses none of those rights by the bankruptcy of his adversary. The same courts remain open to him in such contests, and the statute has not divested those courts of jurisdiction in such actions. If it has, for certain classes of action, conferred a jurisdiction for the benefit of the assignee in the Circuit and District Courts of the United States, it is concurrent with and does not divest that of the State courts."

Mays *v.* Fritton, 20 Wall., 414.

The assignee claimed a fund in the State court of Pennsylvania, as the proceeds of a mortgage given by the bankrupt, by way of preference, and in fraud of the bankrupt act.

It was urged, in the United States Supreme Court, that the whole subject belonged to the United States courts to decide. That when it appeared that proceedings in bankruptcy had been taken, and were still pending, the jurisdiction of the State court was at an end, and the matter should have been certified into the United States District Court for its determination. Inasmuch, however, as it appeared that the assignees had submitted the question, by pleadings, to the State court, they could not raise the question of jurisdiction in the appellate court.

In the language of the court, "It is not competent for a party to assent to proceedings in a court below, take his chances of success, and, upon failure, come here and object that the court below had no authority to take the proceeding;" citing many cases.

So in this case, the assignee, having been appointed within ten days after the commencement of this suit, allows the marshal to plead, submits the whole controversy to the State court, and then, after the necessary lapse of time for the disposition of the case in the State court, applies to the Federal court for an injunction to restrain further proceedings, and bring the whole litigation into the Bankruptcy Court.

Burbank v. *Bigelow*, 92 U. S., 179, was a controversy as to property between a third person and an assignee.

The court say: "We recently held, in the case of Eyster *v.* Gaff, that the bankrupt law has not deprived the State courts of jurisdiction over suits brought to decide rights of property between the bankrupt (or his assignee) and third persons; and whenever the State courts have jurisdiction, the Circuit Courts of the United States have it, if the proper citizenship of the parties exists."

In Lathrop *v.* Drake, 91 U. S., *supra*, the court says: "The State courts may undoubtedly be resorted to in cases of ordinary suits for the collection of property, or the collection of debts, and it is not to be presumed that embarrassments would be encountered in these courts in the way of a prompt and fair administration of justice.

Claflin v. *Hauseman*, 93 U. S., 130, was a suit brought by an assignee in bankruptcy in the State court to recover property transferred by a conveyance, valid except by the bankrupt act, and therefore the question was fairly before the court, whether the State court could take jurisdiction and administer the law in a suit between an assignee and a third party, where the recovery depended upon a right given by the bankrupt act itself.

[In the case at bar, it should be noticed that the case made by complainant's bill is not that the transfer is void under the provisions of the bankrupt act, but the simple ordinary case of fraud under the statute of Elizabeth.]

The court did not pass upon the question whether section 711 of the revision, granting exclusive jurisdiction to the Federal courts in "all matters and proceedings in bankruptcy," excluded the cognizance of plenary suits by the State courts.

And the decision is reached, on a full review of the authorities, that "The State courts have concurrent jurisdiction with the United States courts of actions and suits in which the assignee is a party."

In the language of that judgment, "It is true the sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, as was so clearly shown by Chief Justice Taney in the case of Ableman *v.* Booth, 21 How., 506."

As we shall see hereafter, if the State court had concurrent jurisdiction to entertain this action against the marshal, then that jurisdiction having once attached, is exclusive of that of the Federal courts, and cannot be interfered with.

The principle laid down in 4 East, and that line of English authorities; in Ableman *v.* Booth, Freeman *v.* Howe, and that line of Federal adjudications, applies with all its force.

That principle being, that, as between courts of concurrent jurisdiction that shall have exclusive cognizance and control of the *res*, or of any other subject-matter of litigation, whether it be a thing or any controversy, which has first obtained jurisdiction by the commencement of suit and service of process.

In Jerome *v* McCarter, 94 U. S., 734, it was urged that a Bankrupt Court had absolute and exclusive jurisdiction, and was entitled to the entire administration of the bankrupt's property. This position was urged against a decree of foreclosure entered after the commencement of bankruptcy proceedings on a bill filed before the commencement of these proceedings. The court say the objection is without merit, and cite Marshal *v*. Knox, and Eyster *v*. Goff, *supra*.

(2) *The revision has not changed the law as regards the concurrent jurisdiction of State courts in suits of this nature.*

The language of *section* 711 is as follows: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States.

"First. Of all crimes and offenses cognizable under the authority of the United States. * * * *

"Fifth. Of all cases arising under the patent-right or copyright laws of the United States.

"Sixth. Of all matters and proceedings in bankruptcy."

This exclusion of the jurisdiction of the State courts is a mere legislative construction of the statute as it stood before. "Matters and proceedings in bankruptcy," have been the term applied always to those direct proceedings commencing with the filing of the petition and ending with the discharge of the bankrupt, together with all necessarily incidental matters and proceedings in the administration of the estate. The jurisdiction to entertain suits at law or in equity in respect to property as to which adverse claim was made, has always been held to be an additional jurisdiction conferred by the act, as to which the jurisdiction of the State court was concurrent.

The meaning of the words "matters and proceedings in bankruptcy," was construed before the revision,—the conferring of jurisdiction on the District Courts being in the following language before, as since, the revision: "*They are hereby constituted courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy.*"

This language was construed by the courts precisely *as section* 711 of the revision enacts, as giving exclusive juristion.

The amendment conferring exclusive jurisdiction on the Federal courts "in all matters and proceedings in bankruptcy," is but a confirmation of that construction which the courts had put upon the statute before. It refers to the direct proceedings for the adjudication of bankruptcy, and such jurisdiction as may be exercised by the practice created for that purpose, in a summary manner.

Those courts which held that the State courts had *concurrent* jurisdiction in suits at law and in equity, *before the revision*, held also the jurisdiction of the Federal courts "*in all matters and proceedings in bankruptcy*" was *exclusive*.

Sherman *v*. Bingham, 7 N. B. R., 490; decision by Mr. Justice Clifford, and his language at p. 495.
Morgan *v*. Thornhill, 11 Wall., 65.

The language of Mr. Justice Clifford, in the last case cited, is:

"Exclusive original jurisdiction in all matters and proceedings in bankruptcy is conferred by the acts of Congress upon the District Courts."

See, also, Knight *v*. Cheney, 5 B. R., 305.
Cook *v*. Whipple, 55 N. Y., 150.
Hall *v*. Allen, 12 Wall., 453.

In addition to the jurisdiction conferred upon the Federal courts *in all matters and proceedings in bankruptcy*, which is said by them to be exclusive, these cases go on to show that jurisdiction is also conferred upon the Federal courts in suits at law and equity, concurrent with the State courts.

We say, therefore, that an action of trespass against the marshal cannot be construed to be included within the terms "*matters and proceedings in bankruptcy.*" That no action at law or in equity comes within that meaning. That these distinctions between matters and proceedings in bankruptcy and plenary suits at law or in equity, were as fully made and as well defined before the revision as since.

In *Lathrop* v. *Drake*, 91 U. S., 516, above cited, the distinction is well laid down, as follows:

> "Of this [the District Court's jurisdiction conferred by the bankrupt act] there are two distinct classes: First, jurisdiction as a court of bankruptcy over the proceedings in bankruptcy initiated by the petition, and ending in the distribution of the assets among the creditors, and the discharge or the refusal of the discharge of the bankrupt. Secondly, jurisdiction as an ordinary court of suits at law or in equity brought by the bankrupt, or to claims alleged to be due from or to him. The language conferring jurisdiction is very broad and general. It is that they shall have original jurisdiction (and, of course, exclusive) in their respective districts *in all matters and proceedings in bankruptcy.*"

And then the court goes on to show, as before seen from this decision, that the State courts have concurrent jurisdiction in the second class of cases above referred to.

The Supreme Court of Massachusetts, in *Goodrich* v. *Wilson*, 14 N. B. R., 555, Gray, C. J., on review of the act of 1874 and of the revision, holds distinctly that the jurisdiction of the State courts is not taken away, and uses this language:

> "The jurisdiction conferred upon the courts of the United States as courts of bankruptcy, extends to all controversies between the bankrupt and his creditors, and of the *collection, marshaling, and distribution of his assets. But the jurisdiction of suits at law or equity between the assignee in bankruptcy and any person claiming an adverse interest, is conferred by a distinct provision of the act of Congress, and is not incidental to the jurisdiction in bankruptcy.*
>
> "The jurisdiction in bankruptcy is exclusively vested in the Circuit and District Courts of the United States, and their exercise thereof is not subject to revision by the Supreme Court of the United States.
>
> "The jurisdiction of suits by or against assignees in bankruptcy is part of the common law and equity jurisdiction of the lower courts of the United States, and is subject to the revision of the Supreme Court of the United States, by appeal or writ of error, and does not exclude the concurrent jurisdiction of the State courts."

Cites the cases we have cited, decided before the revision, and then considers the Revised Statutes, (secs. 629, 639, 711, 4972, and 4979, and chap. 390 of the act of Congress of 1874, sec. 2,) and holds that the jurisdiction of the State courts is not taken away, but that it stands precisely as it did before.

In *Went* v. *Young*, 17 N. B. R., 90, the court considered section 711 of the Revised Statutes, giving exclusive jurisdiction to Federal courts over all matters and proceedings in bankruptcy, and uses this language:

> "We regard the section as merely declaratory of the law as it had been laid down by the courts, State and Federal, and as it existed at the time of the revision." * * *
>
> "Section 4972 includes not only matters of which the District Courts, as courts of bankruptcy, theretofore had exclusive jurisdiction, but also those in respect to which a concurrent jurisdiction was possessed by the State courts."
>
> * * *
>
> "It seems to us that the obvious meaning is that the Federal courts have exclusive jurisdiction of all matters and proceedings directly in bankruptcy; but they have concur-

> rent jurisdiction with the State courts of actions which are plenary or ancillary to the proceedings in bankruptcy, among which are actions of the assignee to collect assets of the bankrupt."

The question is fully considered in this case; and *Frost* v. *Hatch*, 14 N. B. R., 443, and *Alcott* v. *McLean*, 16 N. B. R., 79, are considered and disapproved, while *Goodrich* v. *Wilson*, 119 Mass., 427, is fully approved.

In Wiswall *v.* Campbell, 15 N. B. R., 421, Mr. Chief Justice Waite uses this language:

> "The Circuit and District Courts have concurrent jurisdiction of 'all suits at law or in equity brought by an assignee in bankruptcy against any person claiming an adverse interest, or by any such person against an assignee touching any property or rights of the bankrupt transferable to are vested in such assignee;' *but such suits*, when prosecuted, are no part of the bankruptcy proceedings. They are in aid of such a proceeding, but, while progressing, are entirely separate from and independent of it. They are used by the Bankrupt Court to settle the rights of parties *who are not subject to its jurisdiction in the suit in bankruptcy*, and who, therefore, cannot be affected by any judgment or decree that may be made in that cause."

And the distinction is made by the Chief Justice for the purpose of showing that there is no appeal or writ of error to the Supreme Court of the United States from any decision arising from a matter or proceeding in bankruptcy. But the jurisdiction conferred by the above-quoted lines is a distinct jurisdiction from that under which such appeal would lie.

It seems to us, therefore, to be beyond question, that as the jurisdiction of State courts is not taken away, expressly or by implication, in suits of this kind, but only as to *matters and proceedings in bankruptcy*, that now, as before the revision, the State courts have concurrent jurisdiction.

In Kitter *v.* Glinn, 18 N. B. R., 146, the New York Court of Appeals, on full consideration, decided, that since the revision the concurrent jurisdiction of State courts is as it was before then. This case effectually disposes of the two cases in New York Supreme Court, cited above, (14 B. R., 443, and 16 B. R., 79,) which, with one case in Colorado, based on them, are the only cases the other way.

V.

Being concurrent, the jurisdiction of the State courts became exclusive, as it first attached.

In considering the very extensive jurisdiction conferred upon the Federal courts by the bankrupt act, and in considering whether that court had jurisdiction of a suit like this one, we submit that the learned court below has lost sight of the concurrent jurisdiction of the State courts as to this class of actions between adverse claimants; and has assumed that because the Federal courts had jurisdiction they might assume that jurisdiction, and exclude that of the State, whenever applied to and at whatever stage the litigation might have reached in the State court. Whereas the doctrine laid down by an unbroken line of authorities is to the effect, that once admitting a concurrent jurisdiction in two courts, that which first obtains the jurisdiction of the subject-matter of the suit, whether it be of a thing, or of a prosecution to recover any right, or to vindicate a violation of the rights of persons or property, shall retain it to the end, *to the exclusion of the other jurisdiction.* That in such case a suit having been commenced in a court of competent jurisdiction, the jurisdiction of that court becomes exclusive of the other court; as much so as if the two jurisdictions were territorially foreign to each other. The process of one in interfering with the other, or with the free exercise of the jurisdiction of the other, can have no more effect than that of a court of a foreign nation.

In re Campbell, 1 N. B. R., 166. In the western district of Pennsylvania, an application was made to the court to restrain by injunction the plaintiffs from the prosecution of certain suits.

In refusing the injunction, the learned judge (Cadwallader) says:

> "It is an independent tribunal, not deriving its authority from the same sovereign, and as regards the District Court, a forum in every way its equal. The District Court has no supervisory power over it. When the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one if they dare to proceed in the other. * * * * * *
>
> "The fact, therefore, that an injunction issued only to parties before the court, and not to the court itself, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent *forum*."

Antecedently to and independently of the bankrupt act, the Federal courts had no authority to enjoin parties or proceedings in a State court, nor otherwise in any way to interfere with its process or proceedings.

1 Kent's Comm., 412.
3 Story's Comm., 521, 621.

In re Burns, 1 N. B. R., 174, McCandless, J., refused an injunction to restrain the collection of a judgment in a State court, and held, that *if the judgment was fraudulent or void under the bankrupt law*, it *was in the province of the assignee in bankruptcy to see in that forum that no injustice is done to the general creditors.*

Sedgwick *v.* Beiser, 1 N. B. R., 425, Blatchford, J., granted an injunction restraining parties from proceeding in the New York Court of Appeals, in a suit directly affecting the property itself. Justice Nelson dissolved that injunction, by opinion appearing in 1 N. B. R., 675, saying: "The question involving the right to this property is in the State court, where it belongs, and the decision of that court will be conclusive upon the right."

To the same effect, Cadwallader, J., *In re* Donaldson, 1 N. B. R., 181.

In re Marks, 2 N. B. R., 575, the United States marshal, under a provisional warrant, took goods claimed by a third person, and being indemnified under General Order XIII, delivered the same to the assignee in bankruptcy. The claimant sued the marshal for the tort in the State court. The assignee claimed the possession of the property, alleged that the claim of the claimant was illegal, prayed that he be ordered to account therefor, and that he be enjoined from prosecuting the action against the marshal: *Held*, That the marshal is responsible, if he seized property not belonging to the bankrupt; and the petitioning creditors are bound to defend him in the suit brought by the claimant.

In *Clark* v. *Rist*, 3 McLean, 494, Mr. Justice Leavitt says:

> "But when a State tribunal has rightfully taken jurisdiction of a case, though having some connection with an estate in bankruptcy, it affords no sufficient reason for its withdrawal from that jurisdiction that a Federal court might have taken cognizance of it."

See also Clark *v.* Bininger, 3 N. B. R., 518.

In *Alabama R. R. Co.* v. *Jones*, 7 N. B. R., 145, the court, Woods, J., in refusing to interfere with the State courts of Alabama, Georgia, and Tennessee, says:

> "These State Chancery Courts are courts of general jurisdiction, with powers just as large as the powers of this court, and just as competent to administer full relief."

* * * * * *

> "This jurisdiction having been first acquired, controls, and cannot, and should not, be interfered with by this or any other court."

The application was made to the Circuit Court, and was based upon the jurisdiction conferred by the bankrupt act.

In *Samson* v. *Clark*, 4 N. B. R., 1, (see analysis of case at page — of this brief,) Shipman, J., in speaking of the actions in the State courts sought to be enjoined, says:

> "Those actions are under the authority of the State court, which has jurisdiction of the parties and subject-matters, and it must determine the questions as they arise, according to the law, subject to the final judgment of the Supreme Court of the United States, in case any right or claim is set up under any statute of the United States, and such right or claim is denied by State tribunals. In no other way can its decision be reversed or revised."

And he held that the bankruptcy assignee must go into the State court to take advantage of a defense arising under the bankrupt law for the benefit of the estate.

In re Evans, 1 Lowell, 525, a trader had given a fraudulent bill of sale of his stock and fixtures. The assignee in bankruptcy obtained possession of the property through a deputy sheriff, who had attached it under a process which was dissolved by the bankruptcy.

The deputy sheriff and the assignee joined in a bill to restrain the action of trover against the deputy sheriff in the State court, and from bringing any suit therefor against the assignee.

The court, Lowell, J., says: "Assuming that the bill of sale by Evans to Jeffers was voidable by the creditors of the former, as I must assume on demurrer, I yet cannot restrain the suit of Jeffers against the attaching officer, because the latter has a valid defense, and one which the State courts are ready to uphold. It has been twice decided by the Supreme Judicial Court of Massachusetts, that an officer may prove in reduction of the damages in such an action that the conveyance was a fraud on the bankrupt act, and that he has given over the property to an assignee in bankruptcy."

Perry *v.* Chandler, 2 Cush., 237.

Hanson *v.* Herrick, 100 Mass., 323.

"Indeed, I do not know where to find the jurisdiction of this court to try a case between an attaching officer and a stranger to the bankruptcy, or to enjoin such an action pending in the court which has jurisdiction of it."

In *Peck* v. *Jenness*, 7 How., 612, the court, (Mr. Justice Grier,) speaking of the State tribunal, says:

"It was an independent tribunal, not deriving its authority from the same sovereign, and as regards the District Court, a foreign forum, in every way its equal. The District Court had no supervisory power over it. The acts of Congress point out but one mode by which the judgments of State courts can be revised or annulled, and that is by this court, under the twenty-fifth section of the judiciary act. In certain cases, where one of the parties is a citizen of another State, he has the privilege of removing his suit to the courts of the United States. But in all other respects they are to be regarded as equal and independent tribunals.

"It is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy: being liable to a process for contempt in one, if they dare to proceed in the other." * * *

"The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." (7 How., 626.)

In Orton *v.* Smith, 18 How., 263, it was decided that the United States courts should not entertain a bill of peace upon a title in litigation in the State court.

The court refused to entertain the bill for an injunction.

The court, after instancing what might occur by the proceedings in two jurisdictions, says: "When the sheriff puts Orton in possession under the decree in the State court and expels Smith, the Circuit Court, by its officer, must replace Smith or imprison Orton for a contempt. *This would indeed be a humiliating spectacle. Such a disreputable collision of jurisdictions should be sedulously avoided. This can only be done by refusing to entertain a bill of peace for an injunction when the title is in litigation in a court of concurrent jurisdiction.*"

See Miller, J., in 13 Wall., 719, Watson *v.* Jones.

In 6 Wall., 166, one Riggs had obtained a judgment upon municipal bonds in the United States Circuit Court for Iowa. Execution was returned *nulla bona.* Various tax-payers of the county filed a bill in chancery and obtained an injunction from one of the State courts to restrain the county commissioners from levying any tax to pay the judgment. Riggs then applied for a mandamus to compel the commissioners to levy the tax. The court cite the language in Peck *v.* Janness, *supra*, and say:

"State courts are exempt from all interference by the Federal tribunals, but they are destitute of all power to restrain either the process or proceedings in the National courts. Circuit Courts and State courts act separably and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other, as if the line of division between them was traced by landmarks and monuments visible to the eye. Appellate relations exist in a class of cases between the State courts and this court, but there are no such relations between the State courts and the Circuit Courts.

"Viewed in any light, therefore, it is obvious that the injunction of a State court is inoperative to control, or in any manner to affect, the process or proceedings of a Circuit Court, not on account of any paramount jurisdiction in the latter courts, but because, in their sphere of action, Circuit Courts are wholly independent of the State tribunals. Based on that consideration, the settled rule is, that the remedy of a party whose property is wrongfully attached under process issued from a Circuit Court, if he wishes to pursue it in a State tribunal, is trespass. * * * * *

"Undoubtedly Circuit Courts and State courts in certain controversies between citizens of different States are courts of concurrent and coördinate jurisdiction, and the general rule is, that, as between courts of concurrent jurisdiction, the court that first obtains possession of the controversy, or of the property in dispute, must be allowed to dispose of it without interference or interruption from the coördinate court."

It should be noticed that this is not a conflict over a thing, but a controversy applying the same principle precisely as if the conflict of jurisdiction arose over the possession of a *res*.

"A question pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party, and raising a new question as to him along with the old one as to the former party. The old question is in the hands of the court first possessed of it, and is to be decided by such court."

Memphis City *v.* Dean, 8 Wall., 64.

VI.

The English act is broader in its scope and conferment of power than our own, but even here jurisdiction is not assumed in this class of cases.

Section 72 is the corresponding section to our section 1, and is as follows:

"Subject to the provisions of this act, every court having jurisdiction in bankruptcy under this act shall have full power to decide all questions of priorities, and all other questions whatever, whether of law or fact, arising in any case of bankruptcy coming within the cognizance of such court, or which the court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case; and no such court as aforesaid shall be subject to be restrained in the execution of its powers under this act by the order of any other court, nor shall any appeal lie from its decisions, except in manner directed by this act; and if in any proceeding in bankruptcy there arises any question of fact which the parties desire to be tried before a jury instead of by the court itself, or which the court thinks ought to be tried by a jury, the court may direct such trial to be had, and such trial may be had accordingly in the London Court of Bankruptcy, in the same manner as if it were the trial of an issue in one of the superior courts of common law, and in the County Court in the manner in which jury trials in ordinary cases are by law held in such court."

Ex-parte Lyons, 7 L. R. Ch. Ap., 494.

Sir W. M. James, L. J., uses this language:

"The world has already been startled at the extent of the jurisdiction assumed by the Court of Bankruptcy under section 72, and it behooves us to be careful before we enlarge it, and before we allow every branch of the Court of Bankruptcy to set aside solemn deeds in equitable grounds, merely because they had their inception in or were somehow connected with bankruptcy proceedings." * * * "*But it does not follow, because there has been a relation between two parties founded on bankruptcy proceedings, that every dealing between them having any connection with that relation is drawn within the jurisdiction of the Court of Bankruptcy.*"

In Ellis *v.* Silber, 8 L. R. Ch. Ap., 83, Lord Selborne, L. C., uses the following language:

"For all the purposes of administration in bankruptcy, the Court of Bankruptcy is armed with very large powers, both legal and equitable,—as large as may be necessary to do complete justice. *But there was no case cited, and no clause quoted from any act of **Parliament**, to the effect that whenever the trustee of a deed, or the trustee or assignee in bankruptcy, has a demand against a third person, which, but for the bankruptcy, would be proper to be prosecuted in a court of law or in a court of equity, the jurisdiction of the court of law or of the court of equity is, as against that third person, transferred to the court of bankruptcy.* I apprehend that there is nothing whatever in the acts relating to bankruptcy which, in an ordinary case not governed by the special clauses of the acts, has any such effect.

"That which is to be done in bankruptcy, is the administration in bankruptcy. *The debtor and the creditors, as parties to the administration in bankruptcy, are subject to that jurisdiction. The trustees or assignees, as the persons intrusted with that administration, are subject to that jurisdiction. The assets which come to their hands, and the mode of administering them, are subject to that jurisdiction; and there may be, and I believe are, some special classes of transactions which, under special clauses of the acts of **Parliament**, may be specially dealt with as regards third parties. But the general proposition, that whenever the assignees or trustees in bankruptcy, or the trustees under such deeds as these, have a demand at law or in equity as against a stranger to the bankruptcy, then that demand is to be prosecuted in the court of bankruptcy, appears to me to be a proposition entirely without the warrant of anything in the acts of **Parliament**, and wholly unsupported by any trace or vestige whatever of authority.*"

In *Mude* v. *Davis*, 9 L. R. Ch. Ap., 192, it was held that "The seventy-second section of the bankruptcy act of 1869 does not enable the court of bankruptcy to draw within its jurisdiction property, or the owners of property, not vested in the trustee, and not originally subject to the administration in bankruptcy; and, *a fortiori*, does not authorize that court to work out a decree which has been made in chancery against such persons."

The court, in speaking of section 72, says: "But it does not, as we understand it, at all enable the court of bankruptcy to draw compulsorily within the sphere of its jurisdiction property, or the owners of property, not vested in the assignee, and not originally subject to the administration in bankruptcy."

Lord Justice Mellish observed in *Ex-parte Lyons*, *supra*, "Supposing the respondent to bring an action on the covenant (under a deed of composition in bankruptcy) in a court of common law, to recover the money which is covenanted to be paid by that deed: could the court of bankruptcy grant an injunction restraining that action? Clearly it could not, because it would not be a matter relating to bankruptcy."

See Roche & Hazlitt, p. 119.

In *Ex-parte Hide re Turner*, the chief judge refused to interfere with a suit to which the debtor was the sole defendant, of which the Court of Chancery had full seizin, "except where such interference is necessary for the protection of the creditors in bankruptcy."

White v. *Seminous*, 40 L. J. Rep., *ch.* 689, 691, was a bill filed by an equitable mortgagee against the assignee, under liquidation of the mortgagor, seeking a sale of the security. The defendant demurred, on the ground that the court of bankruptcy was the proper tribunal. The demurrer was allowed below; but that decision was reversed on appeal by Lord Chancellor Hatherley, who observed that he did so with great reluctance, as the relief sought might have been more speedily and conveniently obtained in the court of bankruptcy.

> "Undoubtedly it would have been much better for all parties if the plaintiff had done so, but he did not think that he could compel him to go to the court of bankruptcy, because he might want other relief, such as a foreclosure, which he could not get in bankruptcy."

So in this case we are entitled to have damages which we cannot get against an assignee in the Bankrupt Court, and we are not bound by the price brought by the goods.

Many early cases in the District Courts can be cited, where the power was assumed to bring *lien holders* and others before the courts in a summary manner and enjoin their proceedings in other courts. These are cases occurring before the decisions led by Marshal *v.* Knox, Eyster *v.* Gaff, and that class of judgments in this court, and 1 Wool., 342, at circuit.

While it still may be true, that if the bankruptcy proceedings be launched prior to the proceeding of any lien holder, that jurisdiction shall have precedence,—on the principles above considered,—and the lien holder will not then be allowed to proceed without the leave of the bankruptcy court, still it must be borne in mind that every creditor secured, as well as unsecured, is a party to the cause in bankruptcy, and therefore under the control of the court, and that the property is in *custodia legis* by virtue of the adjudication. It should be remembered, also, that it is now well settled, that if the proceeding of the lien holder antedates the petition in bankruptcy, that even in such case the jurisdiction of the State court cannot be ousted. (Eyster *v.* Gaff, 91 U. S.)

But where one not a party; not a creditor; not a lien holder; not the bankrupt, nor the assignee, launches an action to litigate a controversy with parties in a court which at the time is of competent jurisdiction, before any other court has cognizance of that controversy between those parties by due process of law, then that party and that controversy are beyond the jurisdiction of any other court at the suit of his adversaries in the cause so launched.

Don M. Dickinson,

Of Counsel for Relator.

Record -

UNITED STATES OF AMERICA.

TO THE SUPREME COURT:

The petition of Samuel Schwab, of Helena in the Territory of Montana, respectfully shows:

I. That for the period of ten years and upwards now last past he has been a citizen of the United States and a resident of Helena aforesaid, engaged in the business of buying and selling merchandise, and has, for that period, as a custom, made an annual journey to the east for the purpose of buying merchandise for his said business.

II. That in February, 1878, petitioner started from Montana to the east, and on that trip visited Detroit, Michigan, where he had friends and where the lady to whom he was affianced resided, and where, before his return to Montana, he was married.

III. That in the regular course of his business on that trip, he bought goods in St. Louis, Missouri, for his trade in Montana, and while in Detroit one J. W. Smith & Co., a firm doing business on a principal business avenue of the city of Detroit, publicly offered for sale a stock of clothing. That your petitioner examined it and the inventory, negotiated for the same, and finally purchased it at eighty per cent of the cost inventory thereof, paying therefor the sum of of five thousand eight hundred and sixty-three and 34-100 dollars. That petitioner then caused said goods to be boxed up, insured in petitioner's name, marked to petitioner's address in Montana and stored in Detroit with relatives of his intended wife until petitioner should complete his business at the east and was ready to return to Montana.

IV. That petitioner regularly bought and paid for said goods and without notice or any reason to believe that said goods were ever owned by Schott & Feibish, or that they were then or ever directly or indirectly connected with said goods, or the proceeds thereof, in any way or manner, and petitioner fully believes they were not.

V. Said purchase was made on March 4th, 1878, and petitioner having made his other purchases and accomplished his other business, on or about April 5th, 1878, from St. Louis, Missouri, ordered said good to be shipped from Detroit, and then learned, as the facts were and are, the following:

VI. That on March 29th, 1878, Salmon S. Mathews, marshal of the United States for the Eastern District of Michigan, had seized the said goods and taken them from the possession of your petitioner's said storekeepers, against the protest of the latter, and with full notice of the premises given by them to him, and those acting with him.

That said Mathews acted, in making said seizure, under the direction and indemnity of Henry Michaels, Bernard Rothschild, and Ferdinand Hayes, of Rochester, in the State of New York, and of Christopher R. Mabley, of Detroit, who directed the said Mathews to seize said property as the property of one Schott & Feibish, under a warrant from the District Court of the United States for the Eastern District of Michigan, in bankruptcy, to him directed, commanding him to take and hold the property of said Schott & Feibish, under a petition in bankruptcy, filed in said District Court, against said Schott & Feibish, by said Hayes, Michaels, Rothschild, and others, as their creditors, on March 14th, 1878.

VII. That petitioners went immediately to Detroit, gave notice to the said marshal of his rights in the premises, and demanded the return of said goods, informing him fully of the premises, but the said Mathews exhibited to petitioners a bond of indemnity for making said seizure, signed by said creditors and by said Mabley, and refused to deliver back said property.

VIII. Thereupon petitioners retained counsel in Detroit to bring suit against said Hayes, Michaels, Rothschild, Mabley, and said Mathews, for the trespass, and on April 27, 1878, the suit for damages was launched in the Superior Court of Detroit, which is a court of general jurisdiction and of record in and for the State of Michigan; that all of the said defendants appeared in said suit and pleaded to the merits thereof, on May 15th, 1878 (after the appointment of an assignee of said Schott & Feibish by said bankrupt court), and said cause was duly placed upon the docket of said Superior Court, for trial, in July, 1878; trial had, judgment rendered, and all other proceedings duly had, as in and by the record of the Superior Court, hereto attached and entitled "State Court Record," will more fully appear.

IX. That after said suit last aforesaid was commenced, the defendants Rothschild, Michaels, and Hayes, were not found to serve with process, and before the appearance and plea in the cause, they being non-residents of Michigan, under instruction of your petitioner to, if possible, compel the instigators of said seizure to give bonds in Michigan, your petitioner's counsel on May 6, 1878, learning that said Hayes, Michaels and Rothschild were casually in the State of Michigan, commenced a suit by capias against them for their trespass in directing said seizure, and caused them to be held to bail, which suit was brought in the Circuit Court for the County of Wayne, a court of record and general jurisdiction in and for the State of Michigan.

X. Your petitioner further shows that at said trial in said Superior Court, the rights of your petitioner in the premises, and the liability of the defendants in that suit were fully shown by the testimony of your petitioner and other witnesses; but said defendants in that suit moved for and were granted a new trial on condition that they should disclose their defense, and should stipulate not to remove the cause to the federal court, as in and by pages 56 and 61 of the annexed record will more fully appear.

XI. That said new trial having been granted, the cause was assigned for jury trial for October 8th, 1878, in said Superior Court, and your petitioner prepared for the trial on that day in good faith and at great expense, when on the day before said cause was assigned for trial, without notice to petitioner, or his or any of his agents or attorneys, of the application for the same, there was served upon said attorneys the preliminary injunction or restraining order, hereto annexed on page 10, together with the motion, bill in equity and affidavits hereto annexed, entitled "Injunction bill, etc.," all in the Circuit Court of the United States for the Eastern District of Michigan.

XII. That the said complainants in said injunction bill are the defendants in said suit in the Superior Court of Detroit, with the addition of Joseph L. Hudson, assignee of Schott & Feibish, who was appointed assignee within ten days after the commencement of your petitioner's said suit in said Superior Court, who has participated actively in the case of defendants' interests in said suit brought by petitioner, and whose solicitors in said bill of complaint were the attorneys for said defendants in said Superior Court suits.

XIII. Your petitioner further shows that the complainants in said bill filed in said cause in said Superior Court in Detroit the following injunction so as aforesaid granted, whereupon the said Superior Court, of its own motion, vacated the order for new trial, re-instated petitioner's judgment, and ordered that execution issue thereon, and has refused a stay thereof on motion therein based on said injunction in the federal court by defendants in said cause.

XIV. Your petitioner further shows that said goods, after they were taken by said Mathews, were turned over to the said Hudson, and under the direction of the creditors of said Schott & Feibish, but without any notice whatever to petitioner, have been sold at a price greatly below their value, and the proceeds are in the hands of said Hudson, although appraised by said assignee at about the value at which petitioner purchased.

XV. Your petitioner further shows that said preliminary injunction was granted by the Honorable Henry B. Brown, District Judge of the United States for the Eastern District of Michigan, sitting in Circuit Court.

XVI. That said motion for injunction was brought on for argument before the said District Judge, sitting in Circuit Court, on the bill and affidavits thereto annexed, when petitioner, by his counsel, earnestly and respectfully opposed the granting of such injunction, and asked that said preliminary injunction be vacated on the following grounds:

(1) That the State court had exclusive jurisdiction of the suit for damages prosecuted by petitioner, as it had first obtained jurisdiction thereof.

(2) That any objection to the jurisdiction of the State court had been waived by joining issue in the case and by lapse of time.

(3) That the federal court had no jurisdiction to interfere by injunction with an action of tort against the marshal in the State court when the bankrupt act provided for his indemnity against such action.

(4) That Revised Statutes, sec. 720, prohibited such injunction.

(5) That the Circuit Court of the United States had no jurisdiction in the premises, whatever might be that of the District Court.

(6) That neither Circuit or District Court could interfere by injunction to sustain an action for a tort brought by petitioner against the individuals who were not officers of either court or their servants.

(7) That the Circuit Court had no jurisdiction of your petitioner or the subject matter of the suit set up in said bill of complaint, it not being a suit between citizens of different States, or a "suit brought by an assignee in bankruptcy against any person claiming an adverse interest or owing any debt to such bankrupt, touching any property or rights of the bankrupt transferable to or vested in said assignee."

(8) That such jurisdiction could not be sustained unless all the parties, complainants and defendants, in a suit could invoke the jurisdiction if suing separately.

(9) That the granting of the injunction would be followed by an unseemly conflict of jurisdiction.

XVII. Your petitioner shows that after hearing, notwithstanding your petitioner's said objections the said District Judge did make and cause to be issued out of and under the seal of said Circuit Court the order of injunction, a copy of which is hereto attached, marked "injunction."

XVIII. Your petitioner respectfully insists that the objection to the granting of said order so as aforesaid, urged before said District Judge in said Circuit Court were valid.

That said circuit court had no jurisdiction in the premises, and that said District Judge, in making said order of injunction and in refusing to vacate said preliminary injunction, has made a grave mistake.

XIX. That after having proceeded in due course, without objection, in his said suit, and having reached a trial thereof, your orator ought not to be compelled to conduct another litigation for the same purpose and involving the same questions.

XX. That said superior court of Detroit has ordered execution to issue after notice of said injunction, and that there is danger of a conflict between the jurisdiction of the State and Federal courts in the premises. That your orator has no other remedy as against said injunctions, unless this court shall order and direct the said District Judge, sitting in circuit court, to set the same aside.

Wherefore your petitioner prays that the writ of mandamus may issue out of this court to the said the Honorable Henry B. Brown, judge of the district court of the United States for the Eastern District of Michigan, commanding and enjoining him to vacate and set aside said writs of injunction so as aforesaid issued out of the Circuit Court of the United States for the Eastern District of Michigan, and to cause the same to be vacated and set aside, and for such other relief as the court may deem meet and proper.

SAMUEL SCHWAB,
by Martin Butzel, his Agent and Attorney in Fact.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MICHIGAN. }

Martin Butzel, being duly sworn, says that he is the agent and attorney in fact of Samuel Schwab, who is now in Helena, Montana Territory, and that deponent has been directly authorized by said Schwab to make, sign and verify the foregoing petition in his name. That deponent is a brother-in-law of said Schwab, and resides in Detroit, Michigan; deponent is familiar with all the facts set up in said petition.

That the statements in said petition contained are true of deponent's own knowledge, so far as the same are stated therein of the own knowledge of the petitioner therein, and that those matters therein stated on information and belief are true to the best of deponent's knowledge, information and belief.

MARTIN BUTSEL

Sworn and subscribed to before me, this 16th day of November, 1878.

JOHN GRAVES,
U. S. Circuit Court Commissioner in and for the Eastern District of Michigan.

INJUNCTION.

United States of America—In the Circuit Court of the United States for the Eastern District of Michigan, In Equity.—ss.

The President of the United States of America to Samuel Schwab, and to his Counselors, Attorneys, Solicitors and Agents, and each and every of them, Greeting:

Whereas, it has been represented to us in the Circuit Court of the United States for the Eastern District of Michigan, in Equity, on the part of Joseph L. Hudson, assignee, etc., Salmon S. Mathews, Christopher R. Mabley, Bernard Rothschild, Ferdinand Hayes and Henry Michaels, complainants, that they have lately exhibited their bill of complaint against you the said Samuel Schwab, defendant, to be relieved, touching the matters therein complained of; in which bill it is stated, amongst other things, that you are combining and confederating with others to injure the said complainants touching the matters set forth in the said bill, and that your actings and doings in the premises are contrary to equity and good conscience; we therefore, in consideration thereof, and of the particular matters in the said bill set forth do strictly command you, the said Samuel Schwab, and the persons before mentioned, and each and every of you, under the penalty of ten thousand dollars, to be levied on your lands, goods, and chattels, to our use, that you do absolutely desist and refrain from the further prosecution of a suit pending in the Superior Court of Detroit, wherein said Samuel Schwab is plaintiff, and Salmon S. Mathews, Christopher R. Mabley, Bernard Rothschild, Henry Michaels and Ferdinand Hayes, are defendants, and wherein Griffin & Dickinson are attorneys for said Samuel Schwab, being the suit named and described in said complainant's bill of complaint, or from the prosecution of any other or further suit in the State courts, in regard to the seizure by Salmon S. Mathews and his deputies and assistants of said goods described in said declaration of said plaintiff, Samuel Schwab, under the provisional warrant issued in the bankruptcy proceedings in the matter of Samuel Schott and Philip Feibish, from the District Court of the United for the Eastern District of Michigan, in bankruptcy.

Witness, the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at Detroit, this 12th day of November, in the year one thousand eight hundred and seventy-eight.

ADDISON MANDELL,
Clerk.

M. E. CROFOOT,
Solicitor for Complainants.

RESTRAINING ORDER.

At a session of the Circuit Court of the United States for the Eastern District of Michigan, continued and held pursuant to adjournment, at the District Court Room, in the city of Detroit, on Saturday the fifth day of October, in the year one thousand eight hundred and seventy-eight.

Present, Honorable Henry B. Brown, District Judge.

JOSEPH L. HUDSON, Assignee,
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
FERDINAND HAYES,
HENRY MICHAELS and
BERNARD ROTHSCHILD,
Complainants,
vs.
SAMUEL SCHWAB,
Defendant.

In this case, on reading and filing a bill of complaint and the affidavits thereto annexed, and on reading the motion for an injunction founded thereon, it is, on motion of M. E. Crofoot, solicitor for said complainants, ordered that the said Samuel Schwab and his attorneys be and they are hereby restrained from the further prosecution of the suit described in said bill as pending in the Superior Court of Detroit in relation to the property in said bill described, or from the further prosecution of any suit in the State courts, for the subject matter of said suit, until the motion for said injunction shall be heard and decision thereon had.

THE UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MICHIGAN. }

I, *Addison Mandell*, Clerk of the Circuit Court of the United States for the Eastern District of Michigan, do hereby certify that the above and foregoing is a true copy of a restraining order entered upon the journal of the proceedings of said court, in the cause therein entitled: that I have compared the same with the original entry of said order and it is a true transcript therefrom, and of the whole thereof.

[Seal.] Witness my official signature, and the seal of said court, at Detroit, in said District, this fifth day of October, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States of America the one hundred and third.

ADDISON MANDELL,
Clerk.

MOTION FOR INJUNCTION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.—IN EQUITY.

JOSEPH L. HUDSON, Assignee,
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
FERDINAND HAYES,
HENRY MICHAELS, and
BERNARD ROTHSCHILD,
Complainants,
vs.
SAMUEL SCHWAB,
Defendant.

To said Samuel Schwab and his attorneys:

You are hereby notified that a motion for an injunction has been made in the above entitled cause, according to the prayer of a bill filed in said cause, and you are herewith served with a copy of said bill, and the affidavits upon which said motion is founded.

Said motion will be brought to hearing, before said court, on the 14th day of October, 1878, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Yours, etc.,

M. E. CROFOOT,

7th October, 1878. *Solicitor for said Complainants.*

INJUNCTION BILL.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.—IN EQUITY.

To the Judges of the Circuit Court of the United States for the Eastern District of Michigan:

Joseph L. Hudson, assignee of Schott & Feibish, in bankruptcy, of the city of Detroit; Salmon S. Mathews, of the city of Pontiac, and Christopher R. Mabley, of the city of Detroit, and citizens of the State of Michigan, and residing in said district, and Bernard Rothschild, Ferdinand Hayes, and Henry Michaels, citizens of the State of New York, residing in Rochester, as complainants, bring this, their bill of complaint against Samuel Schwab, for matters relating to proceedings in bankruptcy pending in the District Court of the United States for the Eastern District of Michigan, and thereupon your orators complain and say:

I. One Samuel Schott was, for some time prior to 1875, engaged in and carrying on a general business, selling ready-made clothing, at the city of East Saginaw, in said circuit, and that while so engaged he had in his employ, or interested with him, his brother, Max Schott, and that one Joseph Leroux was clerking for him at East Saginaw aforesaid.

That the said Samuel Schott, in the spring of 1875, also opened a business in the city of Detroit, which consisted of the selling of ready-made clothing at retail, and associated with himself his brother-in-law, Philip Feibish, and continued to carry on the said business until 1877, in the city of Detroit, with the said Philip Feibish, doing a retail clothing business.

In the spring of 1873, the said Samuel Schott opened a store in Bay City, and associated with him, or employed as his clerk, said Joseph Leroux, placing him in charge of said business at Bay City; that the said Joseph Leroux at that time, was a man without property or means, and without pecuniary responsibility; that the goods with which they started said business at Bay City were taken from the store at East Saginaw.

That the business at East Saginaw was continued by said Samuel Schott, who claimed that said Max Schott, a brother, was interested with him, either as partner or clerk, and the business was left largely in the charge of said Max Schott.

That the three houses at Detroit, East Saginaw, and Bay City, continued the business from the dates aforesaid down to the fall of 1877, when the said Schott & Feibish claimed to have become embarrassed in business, and were unable to meet their liabilities, and, thereupon, on or about the fourteenth day of September, 1877, the said Schott & Feibish filed their voluntary petition in the District Court of the United States, for said Eastern District of Michigan, in bankruptcy, alleging that they were bankrupts; and upon the same day the said Samuel Schott and Max Schott also filed a voluntary petition in the same court, claiming that they were bankrupts; and, after the filing of the said petition, they proposed a composition with their creditors.

Their creditors, at that time, were largely residents of the city of Rochester and of the city of Buffalo, in the State of New York, and in order to procure an acceptance of their proposition, they claimed that the two firms were indebted about forty thousand dollars, and that they had goods and assets valued nominally at eighteen thousand dollars, or thereabouts; that such proceedings were thereafter had; that the composition was effected, and the resolution for composition was ordered recorded on the thirteenth of November, 1877, which composition was for thirty-five cents on the dollar.

Immediately after said composition, the said Schott & Feibish commenced to purchase goods upon credit and upon time—most of their purchases being on credit of four months, and they so continued their purchases until they amounted to the sum of forty-six thousand dollars and upwards, the new purchases being made of Cauffman & Dinkelspiel, L. N. Sloman & Son, H. Michaels & Co., Strauss, Moore & Beirs, Oppenheimer, Hayes & Co., A. Stern & Co., Nathan Levi & Co., James McDonell & Co., Kolb, Rosenberg & Co., and Jettles & Leseritz—all of the city of Rochester, in the State of New York, and from other firms. Said goods were purchased by said Schott & Feibish, and were sold to said Schott & Feibish by said creditors, for the purpose of carrying on a retail business, and not to wholesale, and any wholesale of said goods by said Schott & Feibish would be out of the ordinary course of their business.

II. After said purchases were so made by said Schott & Feibish, they immediately began to ship goods to the house at Bay City, and to the house at East Saginaw, managed by the said Max Schott, and by said Joseph Leroux, so that goods sent to each of the said houses amounted to ten thousand dollars and upwards; said Schott & Feibish now claim that said goods were sold to said houses at wholesale. Said goods were sent there without payment therefor, and, as these complainants aver and charge, for the purpose of disposing of the same by said Schott & Feibish, so as to place them beyond the reach of their creditors who had sold them the goods.

That about that time the said Schott & Feibish, conceiving the idea of further changing the goods so purchased out of their possession, transferred a large part of the stock of goods so purchased to a store in the city of Detroit, and near their place of business, and placed them in charge of, one Joshua W. Smith, a man wholly without means with which to purchase or pay for any goods, and possessing no pecuniary responsibility; that the goods so placed in charge of said Joshua W. Smith from the stock so purchased by said Schott & Feibish amounted in value to ten thousand dollars and upwards; that the said Joshua W. Smith continued to sell and dispose of the goods, but entirely under the direction and control of said Schott & Feibish, and for their benefit and advantage.

That the said Schott & Feibish continued to sell goods at their place of business also until on or about the eighth of March, 1878, when the bills for the purchase of said goods, made after their first composition, were about maturing; and having placed out of their nominal possession all of their goods and assets, including those purchased after their composition as well as those held before, until they had reduced their stock to about eleven thousand dollars in nominal value, and of goods of the poorest of the stock, they then, on the eighth of March, 1878, made a common law assignment of their assets to a particular friend of theirs, one Adolph Freund, and placed him in possession of said stock.

That no payments were made by the said Schott & Feibish upon the goods purchased after said composition, except a few hundred dollars, and that the same thus remain almost wholly unpaid for.

III. The creditors of said Schott & Feibish, to wit: Cauffman & Dinkelspiel, L. M. Sloman & Son, H. Michaels & Co., Strouss, Moore & Beirs, Oppenheimer, Hayes & Co., A. Stern & Co., Nathan Levi & Co., James McDonell & Co., Kolb, Rosenberg & Co., Jettles & Leseritz, all of the city of Rochester, in the state of New York, learning that the said

Schott & Feibish had been disposing of their goods, and had finally made an assignment of the remnant that they had left, instituted proceedings in the District Court of the United States for the Eastern District of Michigan, in bankruptcy, against the said Schott & Feibish, to wit: Samuel Schott and Philip Feibish, by filing a petition in said court praying that the said Schott & Feibish might be adjudged bankrupts. They also filed a petition showing the disposition of their property in fraud of the bankruptcy act, and obtained from the said court a provisional warrant, which was issued out of and from said court on the day of the filing of the said petition, to wit: the fourteenth of March, 1878, which provisional warrant was directed to the marshal of said district, and was placed in the hands of this complainant, Salmon S. Mathews, who was then the marshal of said district, and acting as such.

IV. The said petitioning creditor, upon investigating the facts, became satisfied that the goods so placed in the possession of the said Joshua W. Smith by said Schott & Feibish, and the goods so sent to the East Saginaw house, to Max Schott, and the goods so sent to Bay City, to said Joseph Leroux and Max Schott, were transferred to said parties by the said Schott & Feibish in violation of the provisions of the bankruptcy act, and when they, the said Schott & Feibish, were insolvent; and that said goods were received by the said Smith, the said Leroux, and the said Max Schott, and the said Adolph Freund, knowing that said Schott & Feibish were insolvent, and that the transfer was made with a view to prevent the property from coming into the hands of an assignee in bankruptcy, and that in fact no real sale of the property was made or intended. *Therefore said creditors insisted that the said goods and chattels were a part and parcel of the assets of the said Schott & Feibish, and that the said goods were liable to seizure by said marshal under said provisional warrant, and demanded that the marshal* *should seize and hold the same, and they gave to said marshal the bond of indemnity provided by General Order XIII.*

V. The said Salmon S. Mathews, believing the claim made by said creditors to be just, proceeded under and by virtue of said provisional warrant, to demand the goods from said Adolph Freund, which had been transferred to him by virtue of said assignment, and the said Adolph Freund turned the same over to him.

Said goods, although nominally of the value of about eleven thousand dollars, were the inferior part of the goods, and were of the actual value of only about five thousand dollars.

VI. That upon inquiry as to the stock of goods that had been in possession of Joshua W. Smith, the said creditors and said marshal ascertained that they had been taken from the store secretly and boxed up; and it was claimed by said Schott & Feibish, and said Freund, that they had been shipped away out of the state and to Montana. According to the best information they, the said creditors and said marshal, could obtain, a man of the name of Samuel Schwab had come here from St. Louis by request of a telegram from said Schott & Feibish, or one of them, and had made a pretended purchase of said goods, and shipped them, as it was claimed, to Montana, where it was claimed he resided; that he paid nothing for said goods, unless by giving his notes. Search was continued for said goods from that time by said marshal and others in his employ, without success, until on or about the twenty-ninth of March, 1878, said marshal learned that said goods were secretly stored in an upper loft of the store of Heineman, Butzel & Co., in the boxes in which they had been taken from the store occupied by Smith, and said marshal went at once and seized said goods, and took them into his possession by virtue of said provisional warrant, as part of the assets of said bankrupts, Schott & Feibish. *Said* *goods were contained in ten boxes and two trunks, which boxes were marked "S. Schwab, Helena, Montana." Upon further inquiry said creditors and said marshal learned that said Schwab was not a merchant or trader, but kept a hotel in Montana.*

At this time said creditors and said marshal learned that said Leroux, at Bay City, was selling goods in his store at auction, and otherwise making unusual efforts to dispose of goods, by direction of said creditors and by virtue of, and with his provisional warrant, said marshal went to Bay City and seized the goods in the possession of said Joseph Leroux as a part of the assets of said Schott & Feibish, bankrupts, and fearing that disposition of the goods in his possession would be made by said Schott, said marshal, under the advice and direction of said creditors, proceeded to East Saginaw and took the goods there into his possession as a part of the assets of said Schott & Feibish, under said provisional warrant.

The seizure of said stock of goods, to wit, those in the boxes marked "S. S. Schwab, Helena, Montana," those in the possession of Leroux, of Bay City, and those in the possession of Max Schott, at East Saginaw, were all made on the twenty-ninth day of March, 1878. Said creditors and said marshal believed, and had reason to believe, that unless said stocks of goods were at once seized, they would be sold and and disposed of and placed beyond the reach of the creditors interested in said bankruptcy proceedings, and they were informed and believed that all the parties connected with their disposition were pecuniarily irresponsible, and that the creditors would lose their remedy against said assets without said seizure. At Bay City, Myron Bunnell, a deputy of said complainant Salmon S. Mathews, and Horace Beckett, also a deputy of said marshal, as an aid and assistant, took part in the seizure of said goods. At East Saginaw, John E. Wells, a deputy of said marshal, took part in the seizure of said goods so taken from the possession of Max Schott. And after said seizure, said Salmon S. Mathews, said United States marshal, and persons in his employ, proceeded to take a complete inventory of said goods and have the same appraised by disinterested persons, and those found in said boxes and trunks, and taken from Heineman, Butzel & Co.'s store, having been thus inventoried, were appraised at seven thousand two hundred and twenty-four and eighty one-hundredths dollars ($7,224.80).

VII. Proceedings were afterwards had upon said creditors' petition, for the adjudication of said Samuel Schott and Philip Feibish as bankrupts, and on the thirteenth day of April, 1878, they were, upon said petition, and in said matter, duly adjudged bankrupts by the said District Court of the United States for the Eastern District of Michigan, and it was referred to the honorable Hovey K. Clarke, register in bankruptcy in said district, to call a meeting of creditors for the election of an assignee. A meeting of said creditors was duly called before said register for the sixth day of May, 1878, and notice thereof was duly given to the creditors of said bankrupts, and on said day, at a meeting of said creditors, this complainant, Joseph L. Hudson, of the city of Detroit, was duly elected assignee of said bankrupts, and on the same day he filed his bond as such assignee, which was duly approved, and he thus became qualified to act as assignee of such estate, and upon the same day an assignment of the estate and effects of said bankrupts was duly made and delivered to him, by which he became entitled to all the effects of said bankrupts, and as he, said assignee, claims, the title to said goods and chattels so claimed by said Samuel Schwab became vested in him as such assignee by virtue thereof.

VIII. After the seizure of said several stocks of goods as aforesaid, the said complainant, Salmon S. Mathews, as marshal, continued to hold the said goods under his provisional warrant until the election and qualification of said Joseph L. Hudson, as assignee, on the sixth day of May aforesaid, when he turned all of said goods and chattels over to said Hudson as the assignee of said bankrupts, and the said Hudson took possession of the same as a part of the estate of said bankrupts.

IX. In April, 1878, said Joseph Leroux and Max Schott, claiming to own the goods so taken by said Salmon S. Mathews, as marshal, under said provisional warrant, from the possession of said Joseph Leroux, at Bay City, commenced a suit by declaration against this complainant Salmon S. Mathews, Myron Bunnell, and Horace Beckett, in the Circuit Court for the county of Bay, and on the twenty-fourth of April, 1878, a copy of the declaration in said suit was served on said Bunnell and Beckett in said Bay county, and on the twenty-ninth day of April, 1878, a copy of the declaration was served on said complainant Salmon S. Mathews.

Said suit is to recover the value of the same goods so seized by the said Salmon S. Mathews under said provisional warrant, and taken from the possession of said Joseph Leroux.

That although the said Salmon S. Mathews, Myron Bunnell, and Horace Beckett entered the store in which said goods were, they did so in a peaceable and quiet manner, doing nothing more than what was necessary to inventory and remove said goods, and they remained no longer in said store than the time necessary for such inventory and removal, and whatever they did therein was only such acts as were necessary to enable them so to seize and remove said goods. That no damage whatever was done to said realty, and that said marshal and his deputies were obliged to enter said store in order to obtain the possession of said goods.

X. Said defendants in said cause have appeared and pleaded, giving notice of the defense of said seizure, and said cause being at issue, the same has by the said plaintiffs been noticed for trial at a term which is now in session in said Bay City, and said cause has been assigned for trial for the second day of October, 1878, in said court. In said suit, McDonell & Mann are attorneys for said plaintiffs, and Hatch & Cooley for said defendants, and said plaintiffs insist that they have a right to proceed in said Bay circuit and try the question as to the title to said goods, and whether they were in fact a part and parcel of the estate of said bankrupts.

XI. On the sixth of April, 1878, said Max Schott commenced a suit in the Circuit Court for the county of Saginaw against this complainant, Salmon S. Mathews, and his deputy, John Wells, by summons returnable on the seventh of May, which suit was to recover the damages for the seizure and taking of the goods from said Max Schott, said Max Schott claiming to be the owner of said goods; that a declaration has been filed in said cause, and the goods therein described are the same goods so seized by said complainant as marshal under said provisional warrant, as part of the estate of said bankrupts, and taken from the possession of said Max Schott, and turned over to said assignee.

Said defendants have appeared in said suit, and the same is at issue and noticed for trial, and is on the docket for the present term.

XII. *On or about the 27th of April, 1878, a suit was commenced by Messrs. Griffin & Dickinson, as attorneys for Samuel Schwab, in the Superior Court of Detroit, to recover for the value of the goods so seized by said Salmon S. Mathews under said provisional warrant, and found in the boxes and trunks marked "S. Schwab, Helena, Montana," against Salmon S. Mathews, Christopher R. Mabley, Henry Michaels, Bernard Rothschild, and Ferdinand Hayes, as defendants*, and a copy of said declaration was on the same day served on the said complainant, Salmon S. Mathews, a copy of which declaration is hereto annexed and marked schedule "A."

That at that time said Samuel Schwab was not in the State of Michigan, but the suit was commenced in his name, as these complainants are informed and believe, for the benefit of said bankrupts, or those acting in concert with them.

That said suit is at issue and upon the docket of the Superior Court for the trial at the present term of said court, and has by said court been assigned for trial for the eighth day of October, 1878. That said attorneys for said plaintiff insist upon proceedings to trial and judgment in said court, and to recover in said suit from said marshal and the other defendants therein the value of said goods named in said declaration.

XIII. On the sixth of May, 1878, Messrs. Griffin & Dickinson, as attorneys for the said Samuel Schwab, commenced a suit in the Circuit Court for the county of Wayne, by *capias*, against Salmon S. Mathews, one of the complainants, and Bernard Rothschild, Ferdinand Hayes, and Henry Michaels; and said Samuel Schwab not being present in the State himself, Sigmund Rothschild, of the city of Detroit, who had been acting in the interest of said bankrupts and others connected with them, made an affidavit to procure an order to hold to bail on said *capias*. Said suit was for the identical cause of action as that commenced by said Schwab in the said Superior Court, and a copy of the affidavit of the said Sigmund Rothschild is hereto annexed, marked "schedule B;" and said suit is still pending in said court.

XIV. On the eighteenth of May, 1878, said Max Schott commenced a suit in said Circuit Court for the County of Wayne, against said complainant, Salmon S. Mathews, and said Bernard Rothschild, Ferdinand Hayes, Henry Michaels, and Max Cauffman, by *capias*, for the identical cause of action as that commenced by him in the Circuit Court for the county of Saginaw, so far as said goods are concerned; and to obtain an order upon said writ to hold to bail, he made an affidavit, describing said goods as in his declaration filed in the Saginaw Circuit.

XV. On the seventh day of May, 1878, said Joseph Leroux commenced a suit, by *capias*, in the Circuit Court for the county of Jackson, against said Bernard Rothschild and others, in which process was served upon said Bernard Rothschild, and, as this complainant, Salmon S. Mathews, is informed, he was included therein, which suit was for the same cause of action as the suit commenced by him and Max Schott in the Circuit Court for the county of Bay; and that said suit, so far as these complainants can learn, is now pending, but in what condition they are unable further to state.

XVI. The said goods so seized under said provisional warrant remained in the hands of said assignee, said complainant, Joseph L. Hudson, and being in such condition that it was advisable for the benefit of those interested in said estate and in said goods that they should be sold, said complainant, Joseph L. Hudson, made application to said bankruptcy court for the sale of said goods, stating the facts in relation thereto, as to the claim made by the said Schwab, Max Schott and Joseph Leroux, and obtained an order for the sale of said goods, and the same have by him been sold, and he holds the funds arising from the sale thereof, to be applied as a part of the estate of said bankrupts, if the title shall be found to be in him as assignee, or if it shall appear that he is entitled to said assets as assignee of said bankrupts, and to distribute the same as a part of their estate, and said funds are now in hand awaiting the determination of that question.

XVII. The complainants Ferdinand Hayes and Henry Michaels had nothing to do with the seizure of said goods, except as creditors of said bankrupts they directed said Salmon S. Mathews, as marshal, to seize the said goods as a part of the estate of said bankrupts. The said Christopher R. Mabley had nothing to do with the seizure of said goods, except to act as an appraiser of some of them after they had been so seized by said marshal, and he is not a creditor of said Schott & Feibish.

XVIII. After the seizure of said stocks of goods by said marshal, Salmon S. Mathews, the creditors of said bankrupts, who had sold them goods after their composition, proceeded to make a thorough examination of the goods so seized and taken, with a view to determine whether they were part and parcel of the goods which had been sold to said bankrupts after their composition, and upon such inventory and examination they ascertained that nearly all of said goods, or, at least, by far the larger part thereof, were goods which had been so sold to said bankrupts Schott & Feibish, by the said creditors, after the composition aforesaid, and that they remained unpaid for; that said goods had been by said bankrupts passed into the possession of the said Joshua W. Smith, Joseph Leroux, and Max Schott, without payment therefor, and for the purpose, as said creditors believed, and as said complainants believe, of getting them beyond the reach of their creditors, and to defeat the operation of said bankrupt act; and the goods named and set out in the declaration, in the suit so commenced by Samuel Schwab in the Superior Court of Detroit, were all of them of the goods of the said Schott & Feibish, mostly purchased after the composition by them with their creditors.

XIX. Said complainants state, upon information and belief, and so charge the fact to be, that all the goods placed in the store so occupied and managed by said Joshua W. Smith, were the goods and chattels of said Schott & Feibish, and were placed there to keep them from their creditors, and they so remained under the management of said Joshua W. Smith until about the 20th day of February, 1878; a pretended transfer of an interest in said goods was, by the advice and direction of said Schott & Feibish, and for their benefit, made to one Adolph Freund; and from that time until on or about the 1st day of March, 1878, the said Schott & Feibish, fearing that said goods and chattels, so in the possession of said Joshua W. Smith and Adolph Freund, would be seized by their creditors, or passed to their assignee, telegraphed to said Samuel Schwab to come to Detroit, and he came, and in the fore part of March, 1878, made a pretended purchase of said goods from said Joshua W. Smith and Adolph Freund, paying nothing down, but giving, or pretending to give, his notes for said goods; and said complainants claim and charge that said goods were, at that time, the goods of said Schott & Feibish, and that said sale was made by them, through said Joshua W. Smith and Adolph Freund, said Adolph Freund testified, upon his examination under oath in proceedings arising out of said bankruptcy proceedings, that when he purchased he gave his notes; that he did not pay said notes, but when the goods were sold to Schwab, he took said Schwab's notes and exchanged them for his.

XX. Said complainants aver, upon information and belief, and so charge the fact to be, that the goods so named in the declaration, in the suit commenced by the said Samuel Schwab, or in his name in the Superior Court of Detroit, *are goods which were transferred through said Smith and Freund by the said Schott & Feibish, to wit, said Samuel Schott and Philip Fiebish, when insolvent, to said Samuel Schwab, and with the intent on their part to prevent them from coming into the hands of an assignee in bankruptcy, and to defeat the provisions of the bankruptcy act*; and within three months before the filing of the said creditors' except as creditors of said bankrupts they directed said Salmon S. Mathews, as marshal, to seize the said goods as a part of the estate of said bankrupts. The said Christopher R. Mabley had nothing to do with the seizure of said goods, except to act as an appraiser of some of them after they had been so seized by said marshal, and he is not a creditor of said Schott & Feibish.

XVIII. After the seizure of said stocks of goods by said marshal, Salmon S. Mathews, the creditors of said bankrupts, who had sold them goods after their composition, proceeded to make a thorough examination of the goods so seized and taken, with a view to determine whether they were part and parcel of the goods which had been sold to said bankrupts after their composition, and upon such inventory and examination they ascertained that nearly all of said goods, or, at least, by far the larger part thereof, were goods which had been so sold to said bankrupts Schott & Feibish, by the said creditors, after the composition aforesaid, and that they remained unpaid for; that said goods had been by said bankrupts passed into the possession of the said Joshua W. Smith, Joseph Leroux, and Max Schott, without payment therefor, and for the purpose, as said creditors believed, and as said complainants believe, of getting them beyond the reach of their creditors, and to defeat the operation of said bankrupt act; and the goods named and set out in the declaration, in the suit so commenced by Samuel Schwab in the Superior Court of Detroit, were all of them of the goods of the said Schott & Feibish, mostly purchased after the composition by them with their creditors.

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XXI. Said Joseph L. Hudson, said assignee, claims that by reason of said suits and the pendency thereof, he is unable to proceed with the settlement of the estate of said bankrupts, that the funds so received for said disputed goods must be kept by him until the question in reference to the title thereof shall be determined. That the suits so commenced against the said marshal and others are intended to and do impede and delay the settlement of said estate by him; and *that the question in regard to the fraud so attempted by said bankrupts and by the said plaintiff in said suit, to wit, Samuel Schwab cannot be determined without the aid of this court, and that said questions cannot be litigated, tried and determined in the State courts.*

XXII. After the said seizure of said goods by said marshal under said provisional warrant, and after the appointment of said assignee of said bankrupts, the books alleged to have been kept by said bankrupts of their business after their composition came into the possession of said assignee, and they have since been examined. The creditors of said bankrupts allege that the books in which the items appertaining to said business after said composition, now appear to be entered, are fraudulent books, made anew by said Schott & Feibish just before the common law assignment of said bankrupts, and with a view to deceive their creditors. They state that said books now show that from the thirteenth of November, 1877, up to and including the twenty-seventh of February, 1878, there was sent to said Joseph Leroux & Co., at Bay City, goods to the amount of nearly twelve thousand dollars from the store of said Schott & Feibish in Detroit, and which remain unpaid for, except by notes of said Leroux & Co. Said books also show the transfer to said Joshua W. Smith of goods to the amount of nearly ten thousand dollars, which were not paid for except by notes, and which still remain unpaid for. Said books also show that goods to the amount of ten thousand dollars and upwards were transferred to Max Schott between the fourteenth of November and up to and including the fourth of March, and which remain unpaid for except by note. Said creditors claim, and said assignee claims and charges that a far greater amount of goods was sent to said three houses, kept by said Joseph Leroux, Max Schott and Joshua W. Smith than now appears upon said books. It also appears from said books, that no other goods were sold by said Schott & Feibish from said Detroit store at wholesale, except to the three houses managed by said Joseph Leroux, Max Schott and Joshua W. Smith.

XXIII. It also appears from the schedules which were filed by said bankrupts, and now remain as a part of the records, that they had indorsed and had transferred the notes of said Joshua W. Smith, Joseph Leroux & Co. and Max Schott to the amount of upwards of twenty-six thousand dollars, and that one Sigmund Rothschild, a cousin of Samuel Schott, of the city of Detroit, held such notes to the amount of upwards of nineteen thousand dollars upon which they, the said Schott & Feibish, were liable as indorsers, all of which notes it is pretended by the said Schott & Feibish, bankrupts, they had taken for the goods so transferred to said Smith, Leroux & Co., and Max Schott, after their composition, and which, as they claim, yet remain unpaid.

XXIV. It also appears upon an examination of such bankrupts that one Frederick Schott, a brother of said Samuel Schott, had some time prior to the fall of 1877, had possession of a stock of goods which he obtained from said Samuel Schott, or from Schott & Feibish, or through them, and that he held them in the Lake Superior country, and that he owed said Samuel Schott some fourteen thousand dollars therefor. That after said composition was effected, or about that time, some of said goods were brought down from Lake Superior and placed in the store of which Joshua W. Smith had charge, and while said bankrupts claimed that said goods belonged to said Frederick Schott, yet they stated that he went to clerking for them in their store, and not in that occupied by Smith; and that they took no measures no obtain payment for said stock of goods, or the amount so due from said Frederick Schott, except to ask for the payment of the same.

XXV. Said complainant, Joseph L. Hudson, assignee of said bankrupts, claims that the whole proceeding in reference to carrying on the business at East Saginaw in the name of Max Schott, and at Bay City, in the name of J. Leroux & Co., and at Detroit, in the name of Joshua W. Smith, was a mere cover by the said bankrupts to divert the goods from the reach of their creditors, and to prevent their passing under the bankruptcy act to the assignee; and that therefore any sale or pretended sale of said stock of goods, should be set aside by the decree of the court, and the whole marshaled at the assets of the estate of said bankrupts.

XXVI. Said complainant Joseph L. Hudson states that he is advised by his counsel, and so claims, that the suit so commenced in the Superior Court of Detroit, in the name of said Samuel Schwab, and pending therein, against the said Salmon S. Mathews as marshal, in relation to the seizure of said goods, is an obstruction to his duties in the settlement of said estate. That the same ought not to be allowed to be prosecuted in the State courts where the complicated matters in relation to the alleged fraud in regard to the transfers of said goods cannot be fully determined. And that the suits so pending in the State courts in relation to the estate of the said bankrupts are a direct obstacle to the speedy settlement and adjustment of the estate, and that the parties therein should be enjoined from the prosecution of said suits; and if said Samuel Schwab has any title or claim to said goods, he should litigate the same in the court of bankruptcy, where matters relating to said estate are pending. And said complainants also claim that as the question in relation to the title of said goods so claimed by said Samuel Schwab involves the determination of the title of said Joseph L. Hudson, assignee of said Schott & Feibish, in bankruptcy, under the bankrupt act, the State courts have no jurisdiction to try that question, and this court should determine the same.

XXVII. Said complainants pray, in consideration of the matters before stated, set forth, and claimed, that the said plaintiff Samuel Schwab, and his attorneys, may be enjoined from any further prosecution of said suit in said Superior Court of Detroit, or in any other court of the State, in regard to the goods so seized by Salmon S. Mathews, as marshal, and for any damages therefor; and that if he, the said Samuel Schwab, claims any title, lien, or interest therein, he proceed to establish said claim in this court, or in the District Court wherein said bankruptcy matters are pending.

XXVIII. And that any sale, assignment, or transfer of said goods from the said Schott & Feibish, or from said Joshua W. Smith or Adolph Freund, to the said Samuel Schwab, may be set aside and held for naught, and decreed to be in violation of the bankruptcy act, and that said goods and chattels may be decreed to be a part of the estate of said estate of said Schott & Feibish, and that the title of said Joseph L. Hudson, said assignee, to said goods or to the funds arising therefrom may be quieted and decreed to be perfect.

XXIX. In consideration whereof, and inasmuch as the said Joseph L. Hudson and the other complainants are only entitled to full relief in this court, where matters of this nature may be fully determined, your orators pray that said Samuel Schwab may full, true and perfect answer make to all and singular the premises hereinbefore stated, averred or charged, without oath—his answer hereto under oath being hereby expressly waived—and that as fully and particularly as if he were hereunto specifically interrogated, and also that he and his attorneys may be enjoined from the further prosecution of said suit or any suit in relation to damages in regard to the seizure of said goods named in said declaration in said superior court of Detroit, except in proceedings in this court or in the bankruptcy court. And that your orators may have such further or other relief in the premises as the circumstances of this case may require and as to this honorable court shall seem meet.

XXX. May it please your honor to grant to your orators a writ of injunction issuing out of and under the seal of this honorable court, according to the form of the statute in such case made and provided and to the rules and practice of this court, directed to the said Samuel Schwab, and his attorneys, commanding, enjoining and restraining him, said Samuel Schwab and his attorneys, from the further prosecution of said suit so pending in the Superior Court of Detroit, or from the prosecution of any other or further suit in regard to the seizure of said goods, save in this court or in the bankruptcy court, and that until a hearing may be had upon the application for an injunction, a restraining order for like purpose may in the mean time be granted, restraining said Samuel Schwab and his attorneys from the further prosecution of said suit.

XXXI. May it please your honors to grant unto your orators a writ of subpœna of the United States issuing out of and under the seal of this honorable court, directed to the said Samuel Schwab, defendant, commanding him on a certain day therein to be named, and under a certain penalty therein to be inserted, to be and appear before this honorable court, then and there to answer all and singular the premises, and to stand to, perform and abide by such order, direction and decree as may be made against him.

M. E. CROFOOT,
Solicitor for Compl'ts.
G. V. N. LOTHROP,
ASHLEY POND, and
WISNER & SPEED,
Counsel.

HENRY MICHAELS,
FERDINAND HAYES,
BERNARD ROTHSCHILD,
JOSEPH L. HUDSON,
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MICHIGAN. }

Joseph L. Hudson, of the city of Detroit, in said Eastern District of Michigan, being duly sworn, deposes and says: That he is one of the complainants in the foregoing bill of complaint by him subscribed, and he has heard read the same and knows the contents thereof; that the said bill is true of his own knowledge except as to those matters which are therein stated to be on the information and belief of said complainants, and as to those matters he believes it to be true.

Sworn and subscribed before me, }
this 16th day of September, 1878. }

JOSEPH L. HUDSON.

Notary Public, Wayne County, Michigan.

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF NEW YORK. }

Bernard Rothschild, Ferdinand Hayes and Henry Michaels, being duly sworn, say, and each for himself says, that they are the complainants named in the foregoing bill of complaint by them subscribed; that they have heard the same read and know the contents thereof; that the said bill is true of their own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters they believe it to be true.

HENRY MICHAELS.
FERDINAND HAYES.
BERNARD ROTHSCHILD.

Subscribed and sworn to }
before me, Oct. 1, 1878. }
WM. W. GILBERT,
U. S. Commissioner for Northern District of New York.

UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF MICHIGAN. }

Joseph L. Hudson and Salmon S. Mathews, being duly sworn, depose, and each for himself says, that he has heard read the above and foregoing bill of complaint, by him subscribed, and he knows the contents thereof; that said bill is true of their own knowledge, except as to those matters which are therein stated to be on information and belief, and as to those matters they believe it to be true, and said Joseph L. Hudson says that said Christopher R. Mabley is not in the district, but has gone to Cincinnati.

SALMON S. MATHEWS.
JOSEPH L. HUDSON.

Subscribed and sworn to before me, }
this 4th day of October, 1878. }
JOHN R. STERLING,
Notary Public, Wayne County, Michigan.

The said complainants, Joseph L. Hudson, Salmon S. Mathews, Christopher R. Mabley, Ferdinand Hayes, Henry Michaels, and Bernard Rothschild, come into court by M. E.

Crofoot, their solicitor, and having filed their bill of complaint, and the affidavits annexed thereto, move this court to grant an injunction, and direct the issuing of the same, according to the prayer contained in their said bill of complaint.

M. E. CROFOOT,
Solicitor for said Complainants.

EXHIBIT "A."

STATE OF MICHIGAN,
THE SUPERIOR COURT OF DETROIT.

Samuel Schwab, plaintiff in this suit, by Griffin & Dickinson, his attorneys, complains of Salmon S. Mathews and Christopher R. Mabley, Henry Michaels, Bernard Rothschild, and Ferdinand Hayes, defendants herein, and thereupon the plaintiff avers that heretofore, to wit, on the twenty-ninth day of March, 1878, at, to wit, the city of Detroit, he was lawfully possessed as of his own property of certain goods and chattels, to wit, certain clothing, to wit, 210 boys' suits, 26 children's suits, 29 Ulsters, 5 Mackinaws, 27 spring overcoats, 45 youths' overcoats, 3 boys' overcoats, 59 beaver overcoats, 79 chinchilla overcoats, 9 youths' Union beaver overcoats, 16 boys' chinchilla overcoats, 11 youths' satinet overcoats, 11 boys' satinet overcoats, 14 mens' castor beaver overcoats, 8 men's satinet overcoats, 8 men's U. S. overcoats, 256 suits, 92 coats, 52 worsted suits, 59 cass. suits, 41 boys' cotton pants, 20 rubber coats, 14 rubber capes, 11 rubber leggins, 31 oilskin coats, 35 alpaca coats, 50 linen coats, 18 black coats, 3 and 3-4ths dozen cloth gloves, 8 dozen overalls, 1 lot jewelry, 1 half dozen knit jackets, 1 lot ties, 11 and a half dozen shirts, five sixths of a dozen boys' shirts, 1 lot collars, 1 lot suspenders, 1 half dozen jackets, 1 lot hats, 7 overcoats, 28 youths' suits, 7 men's extra S. suits, 1 coat and pants, 95 coats and vests, 18 pants and vests, 22 pants, 152 cass. pants, 36 black pants, 19 boys' pants, 10-12ths of a dozen kid gloves, 1 dozen fur top gloves, 2 dozen mittens, 3 1-2 dozen handkerchiefs, 17 dozen socks, 2 1-3 dozen scarfs, 35 vests, 37 1-4 dozen shirts and drawers, 1 lot collars, 2 trunks, twine, umbrellas, of great value, to wit, of the value of twenty thousand dollars, and being so possessed thereof, the said plaintiff afterwards, to wit, on the day and year last aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, at Detroit aforesaid, came to the possession of said defendants by finding, yet the said defendants, well knowing the said goods and chattels to be the property of plaintiff, and of right to belong and appertain to him, but contriving and craftly intending to injure and defraud the said plaintiff in this behalf, have not as yet delivered the said goods and chattels, or any of them, to the said plaintiff, although often requested to do so, but have hitherto wholly refused so to do, and afterwards, to wit, on the day and year aforesaid, at Detroit aforesaid, converted and disposed of the same to their own use, to the plaintiff's damage of twenty thousand dollars ($20,000), and therefore he brings suit.

GRIFFIN & DICKINSON,
Plaintiff's Attorneys.

EXHIBIT "B."

STATE OF MICHIGAN, } ss.
WAYNE COUNTY. }

Sigmund Rothschild, being duly sworn, says, that he is agent for Samuel Schwab, plaintiff in the annexed writ of capias ad respondendum, and makes this affidavit in his behalf; that on or about the 29th day of March, 1878, the said plaintiff was the owner and lawfully possessed as of his own property of certain goods and chattels; that is to say, certain clothing, more particularly described as follows: 210 boys' suits, 26 children's suits, 29 Ulsters, 5 Mackinaws, 27 spring overcoats, 59 beaver overcoats, 45 youths' overcoats, 3

boys' overcoats, 79 chinchilla overcoats, 9 youths' union beaver overcoats, 16 boys' chinchilla overcoats, 11 youths' satinet overcoats, 11 boys' satinet overcoats, 14 men's castor beaver overcoats, 8 men's satinet overcoats, 8 men's U. S. overcoats, 256 suits, 92 coats, 52 worsted suits, 59 cass. suits, 41 boys' cotton pants, 20 rubber coats, 14 rubber capes, 11 rubber leggins, 31 oilskin coats, 18 black coats, 35 alpaca coats, 50 linen coats, 3 3-4 dozen cloth gloves, 8 dozens overalls, 1 lot jewelry, 1-2 dozen knit jackets, 1 lot ties, 11 1-2 dozen shirts, 5-6 of a dozen boys' shirts, 1 lot collars, 1 lot suspenders, 1-2 dozen jackets, 1 lot hats, 7 overcoats, 38 youths' suits, 7 men's extra S. suits, 1 coat and pants, 95 coats and vests, 18 pants and vests, 22 pants, 152 cass. pants, 36 black pants, 19 boys' pants, 10-12 of a dozen kid gloves, 1 dozen fur-top gloves, 2 dozen mittens, 3 1-2 dozen handkerchiefs, 17 dozen socks, 2 1-3 dozen scarfs, 35 vests, 27 1-4 dozen shirts and drawers, 1 lot collars, 2 trunks, lot of twine, and a lot of umbrellas. Which said clothing was on said date of the value of about the sum of eight thousand dollars, and was then in the wholesale clothing store of Heineman, Butzel & Co., Detroit; that on the day last aforesaid Bernard Rothschild, Ferdinand Hayes, Henry Michaels, and Salmon S. Mathews, defendants in annexed writ, took possession of said goods, or caused the same to be taken possession of, and carried away from the said store of Heineman, Butzel & Co., and afterwards, on the same day and year, said defendants converted and disposed of said goods to their own use, and said goods have been and are wholly lost to said plaintiffs.

SIGMUND ROTHSCHILD.

Subscribed and sworn to before me }
this 6th day of May, A. D. 1878. }

GEO. S. HOSMER,
Notary Public, Wayne County, Mich.

UNITED STATES OF AMERICA, }
Northern District of New York. } ss.

Bernard Rothschild, Ferdinand Hayes and Henry Michaels being duly sworn, say, and each for himself says, that they reside in the city of Rochester, and State of New York; that said Bernard Rothschild is a member of the firm of N. Levi & Co; that said Henry Michaels is a member of the firm of H. Michaels & Co., and that said Ferdinand Hayes is a member of the firm of Oppenheimer, Hayes & Co.; that said firms are all creditors of said Schott & Feibish, lately doing business in the city of Detroit, in the State of Michigan. And these deponents further say that they have heard read the annexed bill of complaint, by them signed as complainants, and know the contents thereof; and that all the facts stated in said bill of complaint are true of their own knowledge except as to those matters therein stated on information and belief, and as to those matters they believe it to be true. And these deponents further say that after the seizure of said goods named in said bill of complaint by Salmon S. Mathews, the marshal, and taken from the store of Heineman Butzel & Co., in the boxes and trunks marked "S. S.," said goods were particularly examined by these deponents, article by article, so that these deponents could determine from whom they had been purchased by said Schott & Feibish, and when they had been purchased. And these deponents further say that they believe that all of said goods were purchased of these deponents' firms and other persons after the composition of said Schott & Feibish. That they could identify said goods by the marks upon them, and from the numbers upon them, and from the fabrics themselves. They say that they were able to identify more than three-fourths of said goods as those purchased by said Schott & Feibish after their said composition. And these deponents further say that among the stock of goods so contained in said boxes and claimed by said Samuel Schwab there were goods of a bill amounting to about seven hundred dollars sold to said Schott & Feibish as late as February, 1878, and by Desbecker & Wile; and that the whole of said bill of goods were in said stock. And this deponent, Ferdinand Hayes, found goods in said stock which his firm sold to said Schott & Feibish; and said Michaels found goods in said stock which his firm sold to said Schott & Feibish in the month of December. And these deponents further say that they made as thorough an examination of the affairs of said Schott & Feibish as they could about the time of the filing of the petition in bankruptcy against them, and from such examination they became satisfied that the business at East Saginaw, conducted by Max Schott, the business at Bay City, conducted by Joseph Leroux, and the business conducted in the name of Joshua W. Smith was all the business of said Schott & Feibish.

HENRY MICHAELS.
FERDINAND HAYES.
BERNARD ROTHSCHILD.

Subscribed and sworn to before me }
the 1st day of October, 1878. }

WM. GILBERT,
U. S. Commissioner for the North }
District of New York. }

UNITED STATES OF AMERICA, } ss.
NORTHERN DISTRICT OF NEW YORK. }

David H. Desbecker, being duly sworn, deposes and says that he is a member of the firm of Desbecker & Wile, doing business in the city of Buffalo, and that their house have dealt with the firm of Schott & Feibish, lately doing business in the city of Detroit; that on the eleventh day of February, 1878, the said firm of Desbecker & Wile sold to said Schott & Feibish a bill of goods of ready-made clothing, to the amount of $759, and that said goods were shipped from Buffalo to Detroit to said Schott & Feibish, and that said goods remain wholly unpaid for. And this deponent further says that after the marshal seized said stock of goods, he found said goods, and all of them, contained in the Schwab stock, so called, in the boxes which had been seized by said marshal.

DAVID H. DESBECKER.

Subscribed and sworn to before me,
October 1, 1878.

WILLIAM W. GILBERT,
U. S. Comm'r for the North. Dist. of New York.

STATE COURT RECORD.

In the Superior Court of Detroit.—Calendar Entries.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, and
FERDINAND HAYES.

Trespass on the case.
Damages, $20,000.

Plaintiff's attorneys: *Griffin & Dickinson.*

Defendants' attorneys: *Crofoot & Kudner.*

April 27; narr. filed rule to plead entered.

May 6; proof of service of narr. on Mathews and Mabley filed.

May 17; plea and notice filed.

July 12; testimony of Samuel Schwab filed.

July 12; trial by court; judgment for plaintiff, $7,478.15.

July 13; time to move for a new trial extended ten days.

July 13; motion for new trial filed.

July 16; plaintiff's taxed bill of costs filed, $38.45.

July 17; leave to defendants to file supplemental affidavits on motion for new trial within thirty days; new trial granted conditionally.

Sept. 16; affidavits filed.

Oct. 7; copy restraining order of U. S. Court filed.

Oct. 12; waiver of right of removal of cause to U. S. Court filed.

Oct. 12; order granting new trial vacated; judgment re-instated; execution stayed fourteen days.

Oct. 26; motion for further stay of execution denied conditionally.

Oct. 28; stay of proceedings denied absolutely.

DECLARATION.

STATE OF MICHIGAN—THE SUPERIOR COURT OF DETROIT.

Samuel Schwab, plaintiff in this suit, by Griffin & Dickinson, his attorneys, complains of Salmon S. Mathews and Christopher R. Mabley, Henry Michaels, Bernard Rothschild and Ferdinand Hayes, defendants herein.

And thereupon the plaintiff avers that heretofore, to wit: On the twenty-ninth day of March, 1878, at (to wit), the city of Detroit, he was lawfully possessed, as of his own property, of certain goods and chattels, to wit, certain clothing, to wit, 210 boys' suits, 26 children's suits, 29 Ulsters, 5 Mackinaws, 27 spring overcoats, 45 youths' overcoats, 3 boys' overcoats, 59 beaver overcoats, 79 chinchilla overcoats, 9 youths' Union beaver overcoats, 16 boys' chinchilla overcoats, 11 youths' satinet overcoats, 11 boys' satinet overcoats, 14 men's castor beaver overcoats, 8 men's satinet overcoats, 8 men's U. S. overcoats, 256 suits, 92 coats, 52 worsted suits, 59 cass. suits, 41 boys' cotton pants, 20 rubber coats, 14 rubber capes, 11 rubber leggins, 31 oilskin coats, 35 alpaca coats, 50 linen coats, 18 black coats, 3 3-4 dozen cloth gloves, 8 dozen overalls, 1 lot jewelry, 1-2 dozen knit jackets, 1 lot ties, 11 1-2 dozen shirts, 5-6 dozen boys' shirts, 1 lot collars, 1 lot suspenders, 1-2 dozen jackets, 1 lot hats, 7 overcoats, 28 youths' suits, 7 men's extra S. suits, 1 coat and pants, 95 coats and vests, 18 pants and vests, 22 pants, 152 cass. pants, 36 black pants, 19 boys' pants, 10 1-2 dozen kid gloves, 1 dozen fur top gloves, 2 dozen mittens, 3 1-2 dozen handkerchiefs, 17 dozen socks, 2 1-3 dozen scarfs, 35 vests, 27 1-4 dozen shirts and drawers, 1 lot collars, 2 trunks, twine, umbrellas of great value, to wit, of the value of twenty thousand dollars; and being so possessed thereof, the said plaintiff afterwards, to wit, on the day and year last aforesaid, casually lost the said goods and chattels out of his possession, and the same afterwards, to wit, on the day and year aforesaid, at Detroit aforesaid, came into the possession of the said defendants, by finding; yet the said defendants, well knowing the said goods and chattels to be the property of plaintiff, and of right to belong and appertain to him, but contriving and craftily intending to injure and defraud the said plaintiff in this behalf, have not as yet delivered the said goods and chattels, or any of them, to the said plaintiff, although often requested so to do, but have hitherto wholly refused so to do, and afterwards, to wit, on the day and year aforesaid, at Detroit aforesaid, converted and disposed of the same to their own use, to the plaintiff's damage, of twenty thousand dollars ($20,000), and therefore he brings suit.

GRIFFIN & DICKINSON,
Plaintiff's Attorneys.

DEFENDANTS' PLEA.

THE SUPERIOR COURT OF DETROIT.

SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD and
FERDINAND HAYES,
ads.
SAMUEL SCHWAB.

And now comes the said defendants, by Crofoot & Kudner, their attorneys, and demand a trial of the matters set forth in said plaintiff's declaration.

CROFOOT & KUDNER,
Attorneys for Defendants.

SIRS:

You will take notice that said defendants will give in evidence and show, under the general issue above pleaded, that on the 14th day of March, 1878, a provisional warrant was, by the order of the District Court of the United States for the Eastern District of Michigan, duly and regularly issued out of said court in a matter and proceeding in said court duly and legally pending against Samuel Schott and Philip Feibish, alleged bankrupts, wherein and whereby the United States marshal of said district was duly and legally commanded forthwith to take possession provisionally of all the property and effects of the said alleged bankrupts—said Schott & Feibish—and to safely keep the same until the further order of said court, and which said provisional warrant in due and legal form, and duly and regularly issued, was placed in the hands of Salmon S. Mathews, who was then and there the United States marshal for said district, and that said Salmon S. Mathews, as such marshal, and by virtue of said writ and the command therein contained, did seize and take the goods and chattels, mentioned and described in said plaintiff's declaration, into his possession, and which said goods and chattels were, at the time of said seizure, and at the time alleged in said plaintiff's declaration, the goods, chattels and property and effects of said Samuel Schott and Philip Feibish, and not the goods and chattels and property of said plaintiff.

And all the other of said defendants, in relation to whatever they did in the matter alleged in said plaintiff's declaration, acted under the direction and command of said marshal in making said seizure under said warrant, and for and on his behalf, and as his aids and assistants; that afterwards, to wit, on the 13th day of April, 1878, said Samuel Schott and Philip Feibish were adjudicated bankrupts in said proceedings in said district court, and afterwards an assignee in bankruptcy was duly and regularly elected, and appointed in said cause and said goods and chattels, property and effects described in said plaintiff's declaration, were turned over to said assignee by said marshal, and are now held by him as a part of the estate of said bankrupts.

Dated May 15th, 1878.

Yours, etc.,

CROFOOT & KUDNER,

Attorneys for Defendants.

To Messrs. GRIFFIN & DICKINSON,

Attorneys for Plaintiff.

TRIAL AND JUDGMENT.

At a session of the Superior Court of Detroit, held at the Superior Court Room, in the city of Detroit, on the twelfth day of July, in the year one thousand eight hundred and seventy-eight.

Present, the Hon. Lyman Cochrane, Judge of the Superior Court of Detroit.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD,
FERDINAND HAYES.

This cause having been brought to trial before the court without a jury, the said court, after hearing the evidence in the case, now here finds that the said defendants are guilty of the premises in the plaintiff's declaration in this cause laid to their charge, in manner and form as the said plaintiff hath in his declaration in this cause complained against them, and assesses the damages of the said plaintiff on occasion of the premises at the sum of seven thousand four hundred and seventy-eight dollars and fifteen cents over and above his costs and charges by him about his suit in this behalf expended; therefore it is considered and adjudged by the court now here that the said plaintiff do recover against the said defendants his damages aforesaid, together with his costs and charges aforesaid, to be taxed; and that said plaintiff have execution therefor.

ORDER FOR STAY TO MOVE FOR NEW TRIAL.

At a session of the Superior Court of Detroit, held at the Superior Court Room in the city of Detroit, on the 13th day of July, in the year one thousand eight hundred and seventy-eight.

Present, the Hon. Lyman Cochrane, Judge of the Superior Court of Detroit.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD,
FERDINAND HAYES.

In this cause, on motion of Crofoot & Kudner, attorneys for defendants, ordered that the time to move for a new trial be and the same is hereby extended ten days.

SHOWING ON DEFENDANTS' MOTION FOR NEW TRIAL.

In the Superior Court of Detroit :

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD and
FERDINAND HAYES.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

Christopher R. Mabley, being duly sworn, deposes and says, that he resides in the city of Detroit; that he knew the firm doing business under the name of Schott & Feibish, who have since been adjudicated bankrupts; that he was called upon to inventory and appraise part of the goods in controversy, which had been seized by the marshal as a part of the estate of said bankrupts; that he acted in taking said inventory and appraisal, and that is all he did in the matter; that said goods so seized by the marshal and the assignee, in bankruptcy elected, were turned over to said assignee. Deponent says that said defendants left the whole management of the defense in said cause to the care of M. E. Crofoot, who had been acting as counsel for said defendants from the commencement of said proceedings, and he supposed the matter was receiving prompt and judicious attention, and had no notice or knowledge that a trial would be pressed therein without an opportunity for said defendants to make a defense thereto. This deponent says that all of said defendants desired said cause to be removed to the Circuit Court of the United States for trial, if the same could properly be done. That the papers for the removal were presented to him early on the morning of the twelfth inst., and he executed the same so far as he was requested, and supposed that that was all to be done in the case, and that no trial could then be had. He now learns that a trial was had in the cause ex parte. He says he has fully and fairly disclosed to M. E. Crofoot, said counsel, the facts and circumstances in the cause, and the defense of said defendants therein, and he is informed by said M. E. Crofoot that said defendants have a good and substantial defense upon the merits in said cause, which he verily believes. This deponent says that he was greatly taken by surprise when he learned the fact that a trial of said cause had been had ex parte, and said defendants had no opportunity and did not make any defense in the cause, and that if the judgment obtained therein shall be permitted to stand, great injustice will be done.

C. R. MABLEY.

Sworn to and subscribed before me, }
this 15th day of July, 1878. }

LOUIS F. GUENTHER,
Notary Public, Wayne County, Michigan.

In the Superior Court of Detroit.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, and
FERDINAND HAYES.

STATE OF MICHIGAN, } ss.
County of Wayne. }

Salmon S. Mathews, being duly sworn, deposes and says, that he is the United States marshal for the Eastern District of Michigan; that as such marshal, a provisional warrant was placed in his hands upon the adjudication of Schott & Feibish, as bankrupts, in the District Court, by which he was commanded to seize the goods, property and effects of the estate of said Schott & Feibish, and he was particularly directed to seize the stock of goods in controversy, which are now claimed by this plaintiff. Under such warrant, this deponent did seize such goods as such marshal, and caused the same to be inventoried and appraised, Christopher R. Mabley acting in the inventory and appraisal. He held the goods until the appointment of an assignee in bankruptcy, and then turned said stock over to said assignee. This suit was afterwards commenced by said plaintiff, who, as the deponent then learned, and now believes, resided somewhere in Montana, and does not reside in, and never has been a resident of the State of Michigan. Deponent further says, that in talking this matter over with the other defendants, and with M. E. Crofoot, who has been acting as counsel for them and for deponent, they always desired that said cause should be removed to the federal court, if the same could properly be done. That this deponent set about making inquiries to ascertain the facts in regard to the plaintiff's citizenship, and he learned that the said plaintiff was not a citizen of the United States, nor of any one of the United States, and never had been; that he was not, and never had been, a resident of the State of Michigan, or a citizen thereof; that, in fact, he was a citizen of the empire of Germany; that he communicated these facts to his counsel, M. E. Crofoot, on the eleventh day of July, and supposed that the papers were fully prepared for the removal of said cause. That he did not know anything in regard to said cause until on the morning of the twelfth inst. he was notified to appear as a witness in behalf of said plaintiff, by some one from Messrs. Griffin & Dickinson's office, and he went at such request to the Superior Court room. He did not know that a trial was to be had, or anything in relation thereto, for he had left the same entirely to his counsel, M. E. Crofoot, and supposed that he or his partner, Mr. Kudner, was attending to the same properly. While so in the court room on the twelfth, he was called to the witness stand by Mr. Griffin, and asked a few questions. He did not see Mr. Crofoot or Mr. Kudner in the court room, and he did not know what it meant—that the trial was proceeding without them, or their presence. He had no opportunity to make any defense in said cause, in fact, was taken entirely by surprise by the proceeding without the presence of the attorneys for the defendants in the case. In a few minutes Mr. Kudner came in with the papers for the removal of said cause, but the judge declined to receive them, or to act upon them, and the trial proceeded *ex parte*.

And this deponent further says that he has disclosed to his counsel, M. E. Crofoot, the facts and circumstances which said defendants can establish upon the trial of said cause, and has fully stated to him said defendants' defense therein, and from said facts and circumstances so disclosed, he is advised by his counsel, M. E. Crofoot, that said defendants have a good and substantial defense upon the merits in said cause, which he verily believes.

SALMON S. MATHEWS.

Sworn and subscribed to before me, }
this 15th day of July, A. D. 1878. }

GEORGE D. MUSSEY,
Notary Public, Wayne County.

IN THE SUPERIOR COURT OF DETROIT.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, and
FERDINAND HAYES.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

M. E. Crofoot being duly sworn, deposes and says: That he is one of the firm of Crofoot & Kudner, the attorneys for said defendants, and he has the principal charge of this case. That this is one of a number of cases which arise out of the second adjudication of Schott & Feibish, as bankrupts in the District Court of the United States for the Eastern District of Michigan. That this deponent, in charge of the case, has become possessed of the facts which go to constitute the defense of the defendants in this case. That the goods claimed by the plaintiff are a part and parcel of the stock of goods that formerly belonged to said Schott & Feibish, and which just prior to their adjudication in bankruptcy were claimed to have been sold by some one as a whole to said Samuel Schwab, who was then a resident of Montana. That the said defendants claim that they are a part and parcel of the goods, property and assets of the said bankrupts, Schott & Feibish, and the facts which they can establish by proof will, as this deponent believes, successfully show that they are a part of the estate of said Schott & Feibish.

That the above named Salmon S. Mathews is United States marshal for said district. That said Christopher R. Mabley is a resident of the city of Detroit and a dealer in clothing, and as such was called upon to inventory and appraise the goods seized by the marshal. That the said Henry Michaels, Bernard Rothschild and Ferdinand Hayes are wholesale clothing dealers, and reside at Rochester, New York, and are large creditors of said Schott & Feibish, and their claims, to a great extent, were for ready made clothing, sold to Schott & Feibish, of which the goods, or a large part thereof, named in the plaintiff's declaration, form a part. That under such claim, that the said goods were a part of the estate of said Schott & Feibish, the said marshal seized said goods and held the same under a provisional warrant issued for that purpose, and turned the same over to an assignee in bankruptcy, elected by the creditors. That the said Salmon S. Mathews had nothing to do with said goods except to execute the writ, to wit, a provisional warrant that said Christopher R. Mabley had nothing to do with said goods except to act as an appraiser of the same, and aiding in making an inventory thereof.

And this deponent further says that from full examination of the facts in cause, he believes said defendants have a good and valid defense upon the merits of said action, and he believes that they will be able to establish said defense upon a fair trial of said cause.

Deponent further says that for the last four weeks he has been most of the time necessarily absent from his office in Detroit upon business in the county of Calhoun and in the county of Oakland. That he was informed by Charles Kudner, his partner, that said cause had been noticed for trial at the present term of this court. And upon the day for assigning causes, he, said Kudner, appeared and stated that the said cause was one which would be proper for trial before a jury. His attention was then called to the rules of the Superior Court, and to the fact that a jury had not been demanded the requisite number of days before the term commenced. Judge Cochrane informed said Kudner, as deponent was informed by said Kudner, that if the trial of said cause did involve such question he should not try it himself, but should order the same to be tried by a jury, and, therefore, this deponent did not suppose that a trial could be had at the present term of this court, as no jury had been summoned.

Deponent further says that he has been counsel since the commencement of proceedings in these matters for the above named Henry Michaels, Bernard Rothschild, and Ferdinand Hayes, and other creditors, proceeding against said Schott & Feibish, and has had the principal charge of all the cases arising out of their adjudication, and the seizure of the goods claimed to be a part of their estate; that said defendants, Michaels, Rothschild, and Hayes, and the other defendants, Mathews and Mabley, desired that said cause should be removed to the Circuit Court of the United States for trial, if the same could properly be done, inasmuch as much of the litigation arising out of such matters is pending in the federal court for said Eastern District.

That on the eleventh day of July, inst., deponent was in Detroit, and set about to learn the fact as to the citizenship of the plaintiff Samuel Schwab; that upon making inquiries in regard thereto, he learned that the said Schwab was a citizen of the empire of Germany, and not a citizen of the United States, or any one of the United States, and upon that ground he believes said defendants had a right to the removal of said cause to the Circuit Court of the United States for trial. So believing, he prepared the papers for the removal of said cause, and left the same with said Charles Kudner, his partner, with instructions to procure signatures to the bond of S. Dow Elwood and Jerome Croul; that the said Rochester creditors had made arrangements with said Croul and Elwood to give bail for them in any litigation arising out of said matters. After the preparation of said papers, deponent left for his home in Pontiac, supposing that the papers would be filed in time, and the cause would thus be removed to the United States Court. He did not learn to the contrary until last evening, July twelfth, when he received a letter from said Kudner, informing him that while he (the said Kudner) was absent to procure the signature of one of the sureties, on the morning of the twelfth, and before his return to the court room, the trial of said cause had been commenced, and one witness had been sworn and a few questions asked the witness; that he, said Kudner, then tendered the petition and the bond for the removal of said cause, but the court said that he could not then receive the papers, as the trial had commenced; that a trial was had in said cause, and judgment rendered therein, the same being wholly *ex parte* on behalf of said plaintiff, and no one appearing or taking part in said trial on behalf of said defendants, to make the defense for said defendants.

That in consequence of the facts hereinbefore stated, no preparation had been made for making said defense, and after the calling of said cause there was no opportunity to make said defense for said defendants.

Deponent further says, that he has not sufficient time to communicate with the defendants residing in Rochester, before preparing a motion for a new trial in this cause, but that he is fully authorized to, and he does represent all of said defendants in said cause.

M. E. CROFOOT.

Sworn and subscribed to before me, }
this 13th day of July, A. D. 1878. }

CARLOS E. WARNER,
Notary Public, Wayne County, Mich.

In the Superior Court of Detroit.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, and
FERDINAND HAYES.

STATE OF MICHIGAN, } ss.
County of Wayne, }

Charles Kudner, being duly sworn, deposes and says: That he is one of the firm of Crofoot & Kudner; that in the absence of Mr. Crofoot from the city of Detroit, he attended said Superior Court of Detroit on the day for assigning causes; after said cause had been assigned for trial on the 10th inst., he had a conversation with Judge Cochrane, in which he informed the judge of the nature of said defendants' defense, and that they desired and expected to make a full defense to said action, and that the same would involve the trial of the question of fraudulent transfer and disposition of said property, and would require the examination of a great many witnesses. Deponent had previously had a conversation with Walter Harsha, the clerk of said superior court, in which said Harsha informed this deponent that he had talked over the question involved in said cause, and likely to be tried in said court, and that the judge said it was one that he would not try without a jury; and deponent did not expect said cause would be tried in said superior court, or anywhere else, without a jury.

Deponent further says that M. E. Crofoot, acting on behalf of the creditors of Schott & Feibish, had informed this deponent that he would remove this cause to the Circuit Court of the United States for trial if there was cause for removal; and being in Detroit on the eleventh of July, said Crofoot set about inquiring in reference to the facts which would give him a right to a removal, and then learned that the said Schwab was not a citizen of the United States, nor of any of the States, and upon that ground prepared the papers for a removal of the cause to the Federal Court, and left the papers with deponent to be presented in court the following morning. Deponent was to get the bond signed by S. Dow Elwood and Jerome Croul, as sureties, and deponent got the papers all prepared before the opening of court on the morning of the twelfth of July, except the obtaining of the signature of Jerome Croul; he went to Mr. Croul's place of business in this city, and was unable to find him there, and learned he was at his tannery up near Hamtramck. This deponent then took the papers and went to Judge Cochrane and showed them to him before the opening of court, and told him that he had been requested to get the signature of Jerome Croul, and would have to go to the tannery for it; the judge informed him that he would have time to get that signature before the case would be called for trial, and thereupon the deponent took the papers and proceeded as rapidly as possible to the tannery, where he procured said signature and returned to the court with the papers. He then found that said cause had been called, that trial had been commenced, and said defendant Mathews had been sworn and a few questions asked him. This deponent then presented said papers to the judge, and the judge said it was too late; he could not accept said papers, and the said trial proceeded.

Deponent being wholly unprepared to make any defense in said cause, and none of said defendants being prepared to make a defense thereto, no defense was made in said cause, and the same proceeded *ex parte*, and judgment was rendered therein. That trial of said cause under the circumstances was great suprise to this deponent, and he and his partner were wholly unprepared to make any defense to said cause under the circumstances, and a judgment rendered in the cause under such circumstances is a great wrong to the defendants.

Sworn and subscribed before me, }
this 13th day of July, A. D. 1878. }

CHARLES KUDNER.

CARLOS E. WARNER,
Notary Public, Wayne Co., Mich.

THE SUPERIOR COURT OF DETROIT.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS et al.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE, }

Walter Harsha, being duly sworn, says he is clerk of said court. This deponent further says that on Wednesday, the 10th July inst., he met Charles Kudner, one of the attorneys for said defendants, and stated to him that he had a conversation with Judge Cochrane in regard to the trial of said cause. He further informed said Kudner that said Judge Cochrane would not try said cause, but would have a jury trial therein.

WALTER S. HARSHA.

Subscribed and sworn to before me, }
this 13th day of July, 1878. }

GEO. F. ROBISON,
Notary Public, Wayne County, Mich.

THE SUPERIOR COURT OF DETROIT.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD AND
FERDINAND HAYES.

And now come the said defendants by Crofoot & Kudner, their attorneys, and move the court to set aside the judgment in this cause and grant a new trial therein for the following reasons:

First. That said trial was had *ex parte*, and no defense on behalf of said defendants was made, nor was there any opportunity on their behalf in making such defense.

Second. Because said defendants and their attorneys were entirely taken by surprise on the trial of said cause *ex parte* under the circumstances.

Third. Because great injustice will be done to the defendants in said cause, unless a new trial will be granted.

Dated at Detroit, July 13th, 1878.

Yours, etc.,

CROFOOT & KUDNER,
Attorneys for Defendants.

To Messrs. Griffin & Dickinson, Attorneys for said Plaintiffs:

GENTLEMEN—Please take notice that the defendants in the above cause have made and entered a motion for a new trial in said case, of which the above is a copy. Said motion is based upon the files and records in the case, and upon the affidavits of M. E. Crofoot, Chas. Kudner, Salmon S. Mathews, Christopher R. Mabley, and Walter Harsha, with copies of which you are herewith served. Said motion will be brought on for hearing before said court, at the court room in the city of Detroit, on the 17th day of July, 1878, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated Detroit, July 13th, 1878.

Yours, etc.,

CROFOOT & KUDNER,
Attorneys for Defendants.

ORDER GRANTING NEW TRIAL.

At a session of the Superior Court of Detroit, held at the Superior Court room, in the city of Detroit, on the 17th day of July, in the year one thousand eight hundred and seventy-eight.

Present: The Hon. Lyman Cochrane, Judge of the Superior Court of Detroit.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, and
FERDINAND HAYES

In this cause, a motion for a new trial having been brought on for argument, after hearing counsel for respective parties, it is ordered that judgment herein is hereby vacated, and that a new trial of said cause be had on the following conditions, viz.: That defendants waive right of removal to United States Court; that they pay $25 attorney fee; that they go to trial at next term of the court; and that defendants file supplemental affidavits disclosing defense on or before Sept. 16th next.

SHOWING FILED BY DEFENDANTS IN ACCORDANCE WITH CONDITION.

IN THE SUPERIOR COURT OF DETROIT.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, AND
FERDINAND HAYES.

STATE OF NEW YORK, } ss.
MONROE COUNTY. }

Henry Michaels, *Bernard Rothschild*, and *Ferdinand Hayes*, being duly sworn, each one for himself, deposes and says that he is one of the defendants in the cause above entitled, and resides in the city of Rochester, in said county and State. That said cause arises out of the seizure of goods, to wit: the goods and chattels mentioned in said plaintiff's declaration as a part of the estate of Schott & Feibish, to wit, Samuel Schott and Philip Feibish, bankrupts, by Salmon S. Mathews, as United States Marshal, one of said defendants under and by virtue of a provisional warrant issued out of and from the District Court of the United States for the Eastern District of Michigan, in said bankruptcy matter.

And this deponent further says that after the seizure of said goods as aforesaid by the United States marshal he was present at a full and thorough examination of said goods, and he could identify them, or a large part thereof, by the marks and numbers upon them, and by the goods themselves.

He states that the house of which he is a member is a large creditor of the said Schott & Feibish.

He says said Schott & Feibish had been doing a clothing business in the city of Detroit prior to September, 1877; that said Schott & Feibish filed their petition in said District Court, alleging therein that they were bankrupts on or about the fourteenth day of September, 1877, and afterwards obtained a composition under the bankrupt act with their creditors, of which the house of which the deponent is a member was one.

At or about the time of filing said petition, said Schott & Feibish claimed to their creditors that they owed about $25,000, and had stock of goods valued at about $18,000.

That after said composition, which was effected in November, 1877, the said Schott & Feibish continued their business and obtained goods on credit, of different creditors, to the amount of about $46,000, among which was the firm of of H. Michaels & Co., Nathan Levi & Co., and Oppenheimer, Hayes & Co., all of Rochester, N. Y., to the aggregate amount of $13,000, or thereabouts, of which firm these deponents were severally members, and Schott & Feibish have paid nothing on those subsequent purchases but a few hundred dollars, and that they all remained unpaid, except as aforesaid, when the creditor's petition in bankruptcy was filed against them, said Schott & Feibish, on or about the 14th of March, 1878, and that the goods mentioned in the plaintiff's declaration, or a large part of them, were goods purchased by the said Schott & Feibish, after their said composition, and remained unpaid for, and these deponents identified them as such upon their examination as aforesaid; and said defendants claim, and expect to be able to establish by proof, said goods were purchased after said composition by said Schott & Feibish, with the intent to defraud said creditors, of whom they purchased.

That the goods named in the declaration in this case if they were ever transferred to Smith, or Smith & Freund, were transferred to them without payment, and merely to be held as the goods of Schott & Feibish, and with full knowledge on the part of Smith & Freund of the contemplated fraud, and that if any transfer was ever made to the plaintiff in this case, Samuel Schwab, it was also a part of the scheme and conspiracy entered into by said Schott & Feibish, carried on with said Schwab with his full knowledge thereof, to defraud the creditors of said Schott & Feibish, and to place said goods beyond the reach of said creditors by transferring them beyond the bounds of the State.

HENRY MICHAELS.
BERNARD ROTHSCHILD.
FERDINAND HAYES.

COUNTY OF MONROE, }
State of New York. } ss.

On this twelfth day of September, A. D. 1878, before me George M. Elwood, a commissioner for the State of Michigan, appointed by the Governor of the said State of Michigan in and for the State of New York, personally appeared Henry Michaels, of the firm of H. Michaels & Co., Bernard Rothschild, of the firm of N. Levi & Co., and Ferdinand Hayes, of the firm of Oppenheimer, Hayes & Co., and being severally sworn, duly made oath to the contents of the foregoing affidavit.

In witness whereof I have hereunto set my hand and affixed my seal this 12th day of September, 1878.

[Seal.] GEORGE M. ELWOOD,
Commissioner for the State of Michigan.

SUPERIOR COURT OF DETROIT.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD and
FERDINAND HAYES.

STATE OF MICHIGAN, } ss.
COUNTY OF WAYNE. }

Salmon S. Mathews and Christopher R. Mabley, two of the above named defendants in the above cause, being duly sworn, depose and say, and each for himself says, that they reside in the State of Michigan, the said Mabley in Detroit, and the said Mathews in Pontiac; that they have been joined in said suit with the above named defendants, Henry Michaels, Bernard Rothschild, and Ferdinand Hayes, all of whom reside in the city of Rochester, in the State of New York, and are members of firms engaged in the wholesale clothing trade there; and these defendants say that their defense to said action is, that the goods and chattels described in said plaintiff's declaration were seized by the said Salmon S. Mathews, as United States marshal, under and by virtue of a provisional warrant issued out of and from the District Court of the United States for the Eastern District of Michigan, in bankruptcy, in the matter of Samuel Schott and Philip Feibish, bankrupts, or alleged bankrupts, wherein the creditors of said Schott & Feibish had filed a petition against them, said Schott & Feibish.

That said goods and chattels were seized by said Mathews, as marshal, as a part of the stock of said Schott & Feibish as bankrupts, and which said seizure is the conversion of said goods and chattels alleged in said declaration and said defendants' defense is that said goods and chattels were purchased by said Schott & Feibish on credit, after a composition with their creditors in November, 1877, which they procured in their former bankruptcy matter, and which purchases were made by said Schott & Feibish with the intent on their part to cheat and defraud their said creditors out of the pay for the same; that said Schott & Feibish afterwards pretended to transfer said goods and chattels to one Joshua W. Smith with like intent, or to Smith & Freund with like intent without pay, and with the full knowledge of said Smith & Freund, of such intent; that they, said Schott & Feibish, with like intent procured said goods and chattels to be transferred to said plaintiff in this suit, who then claimed to reside in Montana, without payment therefor, with intent to have them transferred from the State and out of the reach of their creditors, and that said plaintiff had full knowledge of such intent.

C. R. MABLEY.
S. S. MATHEWS.

Subscribed and sworn to before me, }
this 13th day of September, 1878. }

GEO. D. MUSSEY,
Notary Public, Wayne Co., Mich.

STIPULATION OF DEFENDANTS NOT TO REMOVE TO U. S. COURT.

SUPERIOR COURT OF DETROIT.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD, AND
FERDINAND HAYES.

In this cause that said defendants having undertaken to remove said cause to the United States Court, under the act of Congress of 1875, for the reason that said plaintiff was a citizen of the German Empire, and not a citizen of the United States; but not having filed the petition and bond in time, and the counsel for said plaintiff having insisted at the argument of the motion for a new trial, that if a new trial was granted it should be upon condition that said defendants waive the right of removal to the United States Court, and said Superior Court having insisted in said order for a new trial, that defendants waive the right of removal to the United States Court.

Said defendants have, since the making of said order, waived any right of removal under said act of Congress of 1875, or any other act for the removal of causes.

And said defendants now, by their said attorneys, Crofoot and Kudner, come and formally waive in writing any right of removal of said cause to the United States Court under said act of Congress of 1875, or under any other act of Congress providing for the removal of causes from the State to the federal courts.

CROFOOT & KUDNER,
Attorneys for said Defendants.

12th October, 1878.

ORDER VACATING ORDER FOR NEW TRIAL ON FILING FEDERAL INJUNCTION.

At a session of the Superior Court of Detroit, held at the Superior Court Room in the city of Detroit, on the twelfth day of October, one thousand eight hundred and seventy-eight.

Present, the Hon. Lyman Cochrane, Judge of the Superior Court of Detroit.

SAMUEL SCHWAB
vs.
SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD and
FERDINAND HAYES.

In this cause, it is by the court now here on his own motion ordered, that the order heretofore granted herein, on the seventeenth day of July last, vacating judgment and granting a new trial to said defendants, upon certain conditions therein specified, be and the same is hereby vacated, set aside and held for naught. It is further ordered that the judgment heretofore rendered in this cause in favor of the said plaintiff and against the said defendants, for seven thousand four hundred and seventy-eight dollars and fifteen cents damages, and costs of suit to be taxed, be and the same is hereby in all respeetsfully re-instated; *and that said plaintiff have execution therefor.* It is further ordered the execution in this cause be and same is hereby stayed for the period of fourteen days from this date.

ORDER DENYING STAY OF EXECUTION CONDITIONALLY.

At a session of the Superior Court of Detroit, held at the Superior Court room, in the City of Detroit, on the twenty-sixth day of October, in the year one thousand eight hundred and seventy-eight.

Present: The Hon. Lyman Cochrane, Judge of the Superior Court of Detroit.

SAMUEL SCHWAB

vs.

SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD AND
FERDINAND HAYES.

In the cause a motion on behalf o' defendants for a stay of execution having come on for argument, after hearing Mr. H. C. Wisner, of counsel for defendant, in favor of said motion, and Mr. Don M. Dickinson, of counsel for plaintiff, in opposition thereto, said motion is by the court now here denied, upon condition that attorneys for the plaintiff will not issue execution until an application shall be heard in Supreme Court of State or in a Federal court upon question of jurisdiction of federal court to grant stay.

ORDER DENYING STAY OF EXECUTION ABSOLUTELY.

At a session of the Superior Court of Detroit, held at the Superior Court room, in the city of Detroit, on the twenty-eighth day of October, in the year one thousand eight hundred and seventy-eight.

Present: The Hon. Lyman Cochrane, Judge of the Superior Court of Detroit.

SAMUEL SCHWAB

vs.

SALMON S. MATHEWS,
CHRISTOPHER R. MABLEY,
HENRY MICHAELS,
BERNARD ROTHSCHILD AND
FERDINAND HAYES.

In this cause, on motion of Griffin & Dickinson, attorneys for plaintiff, after hearing Mr. H. C. Wisner, of counsel for defendants, in opposition, it is ordered that the order entered in the cause on the twenty-sixth instant, staying execution conditionally, be, and the same is hereby vacated and set aside, and *said order for a stay of execution is hereby denied absolutely*.

STATE OF MICHIGAN,
County of Wayne, } *ss.*
CITY OF DETROIT.

I, Walter S. Harsha, Clerk of the Superior Court of Detroit, do hereby certify that the above and foregoing, is a true and correct copy of papers properly on file and all proceedings had and entered in the above entitled cause by said court, as appears of record in my office. That I have compared the same with the original, and it is a true transcript therefrom, and of the whole thereof.

In testimony whereof, I have hereto set my hand and affixed the seal of the said Superior Court of Detroit this sixth day of November, A. D. 1878.

[SEAL.]

WALTER S. HARSHA,
Clerk.

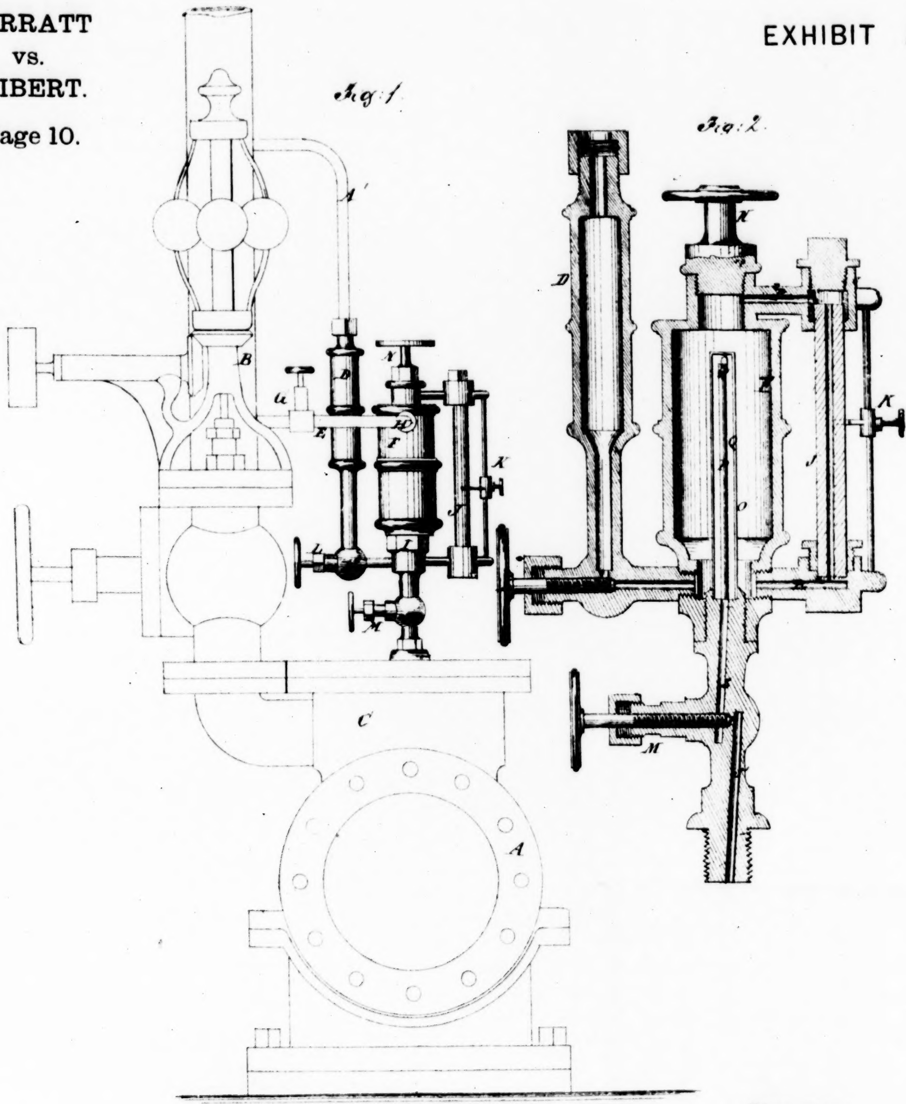
N. Seibert,

Lubricator.

No. 111,881. Patented Feb. 14. 1871

No. 344.
GARRATT
vs.
SEIBERT.
Page 10.

EXHIBIT A.



Witnesses:
Chas. Nida
L. S. Mabee

Inventor:
N. Seibert
Per Munn & Co
Attorneys.

No. 344.

GARRATT
vs.
SEIBERT.

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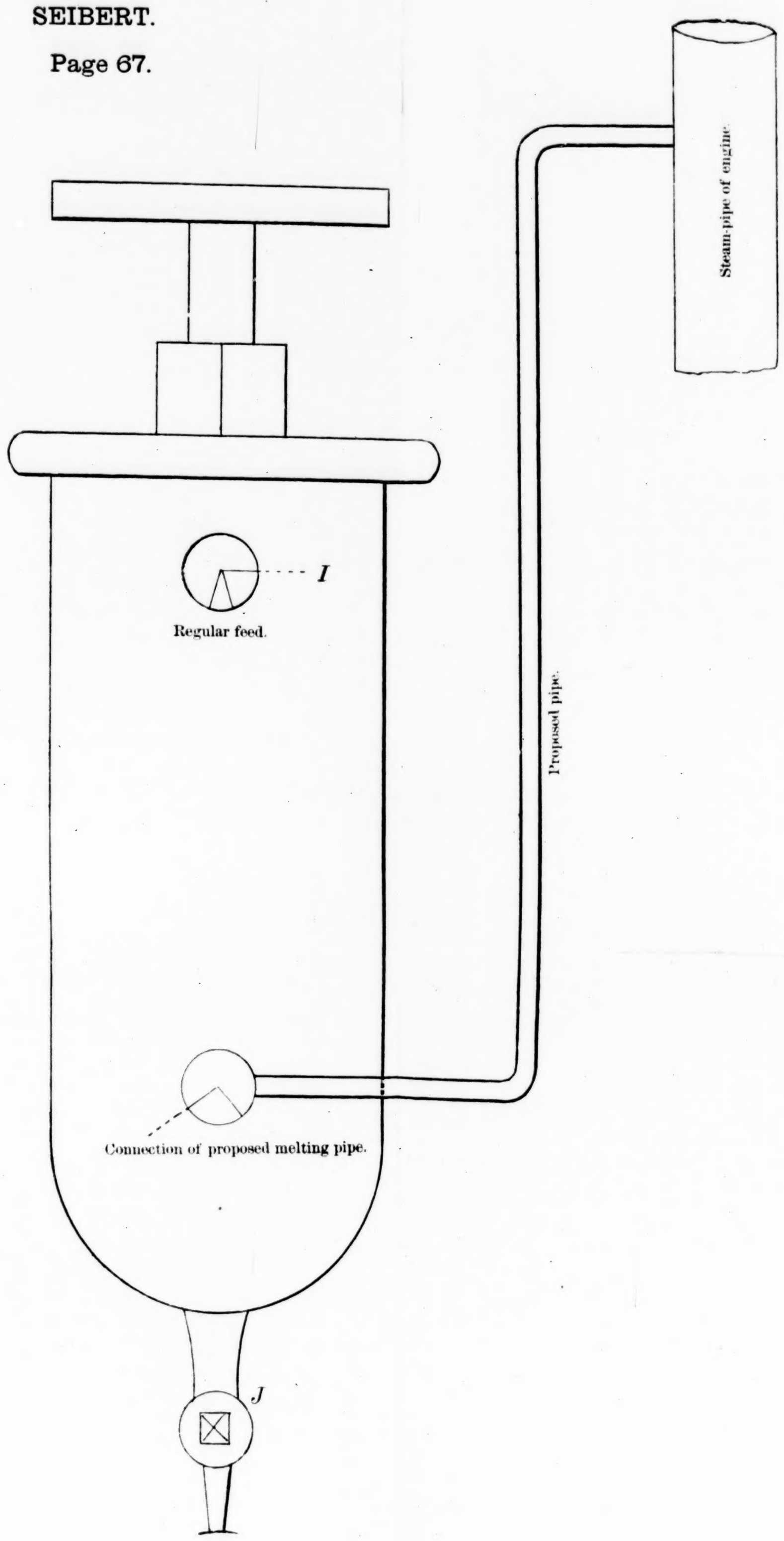
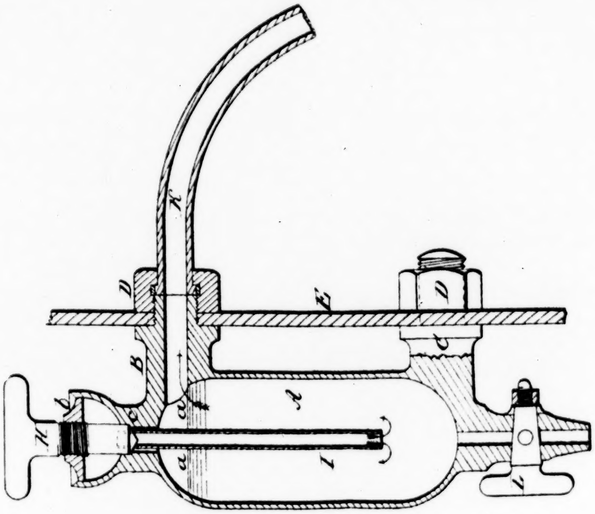
WATSON'S EXHIBIT A.

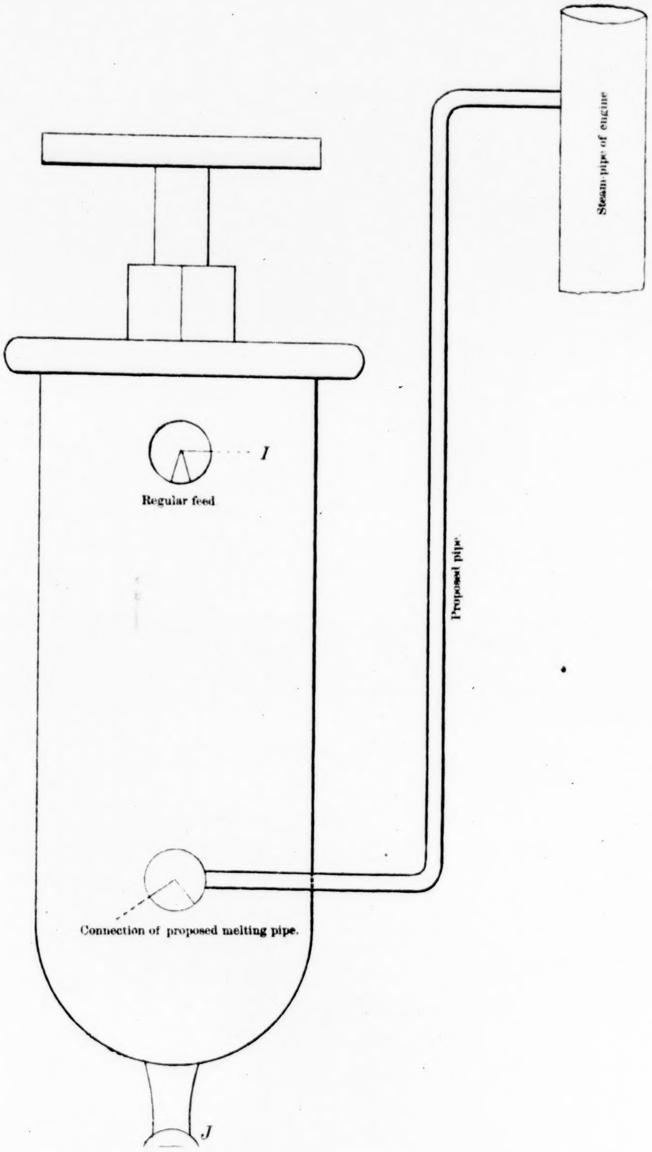


ROSCOE CUP. **Plate IV.**

Fig. 2.



WATSON'S DRAWING. **Exhibit A, Plate V.**



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No. 322

Pl 2

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California Powder Works } page 105

Fig. 1.

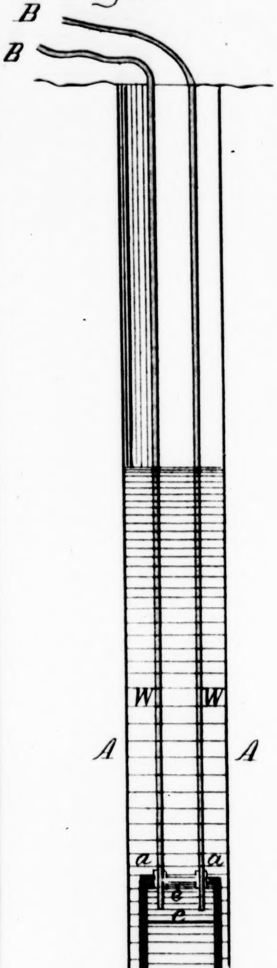


Fig. 2

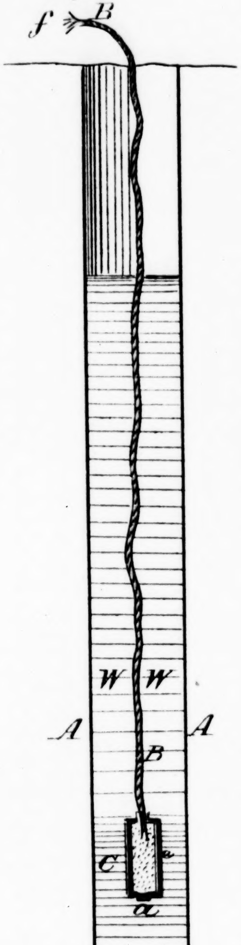


Fig. 3.

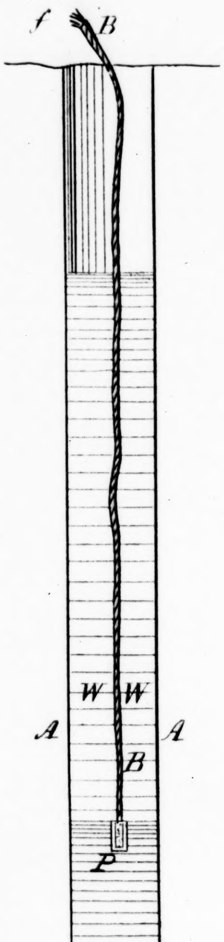
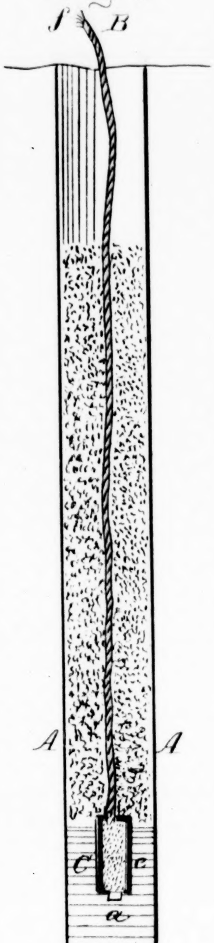


Fig. 4



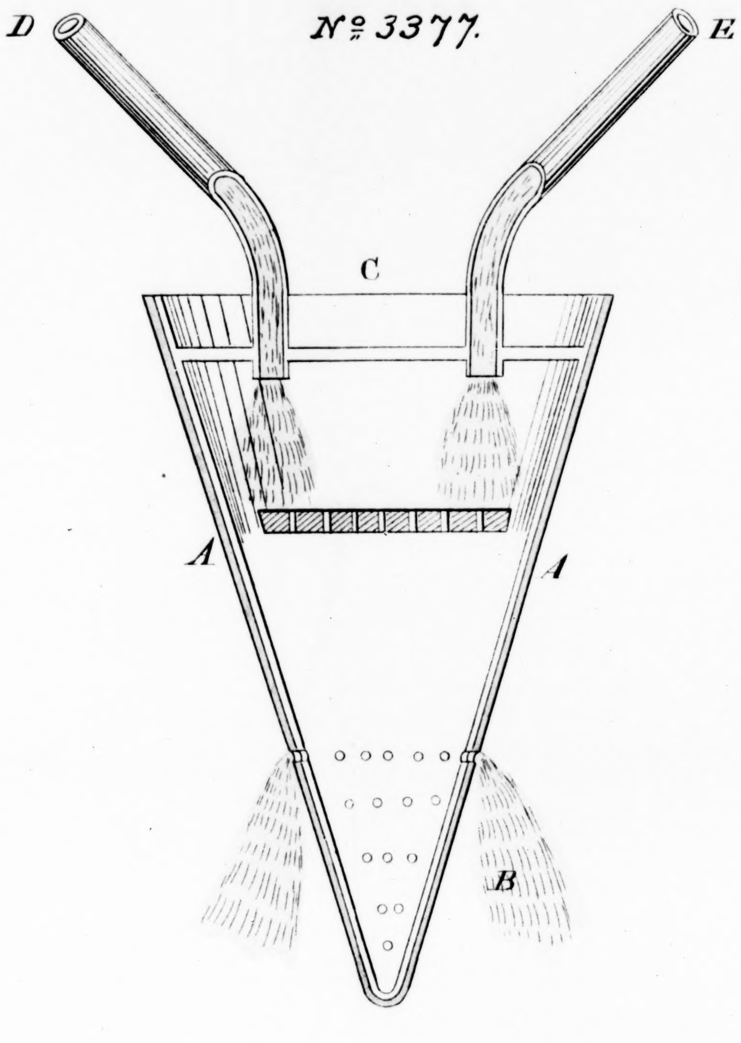
Pl 1.

Alfred Nobel

Impᵗ in the Use of Nitro Glycerine

Reissued April 13, 1869.

No. 3377.



No. 342
Giant Powder Co
v
California Powder Works } page 106

Assignee
The United States Blasting Oil Company

Inventor.-Alfred Nobel

Tal. P. Shaffner

Chas C Wilson
J. E. M. Bowen

James Deveau

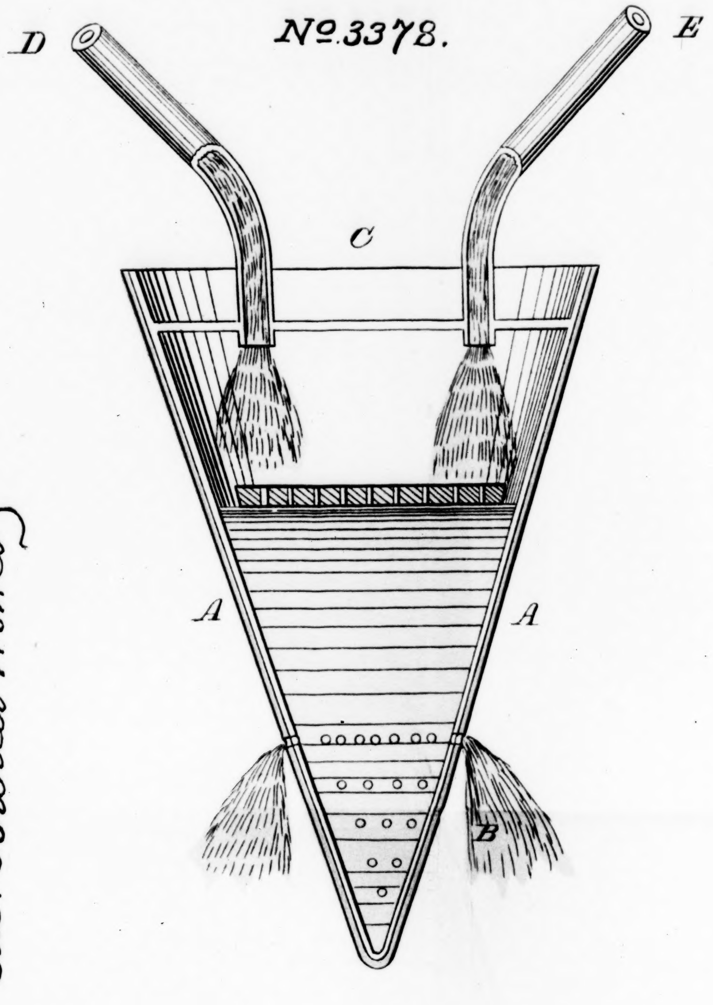
106

Alfred Nobel Pl. 1.

Impd Mode of Manufacturing Nitro-Glycerine

Reissued April 13. 1869.

No. 3378.



No. 322
Giant Powder Co
vs.
Cal. Powder Works } page 123

Assignee
The United States Blasting Oil Company

Inventor:-Alfred Nobel

Witnesses.
Chas. C. Wilson
J. E. M. Bowen

Jas. S. Shaffner Pres
James Deveau Secy

No. 3378. No 322 Giant Powder Co. vs Cal. Powder Works } page 122 Pl. 2.

Fig. 1.

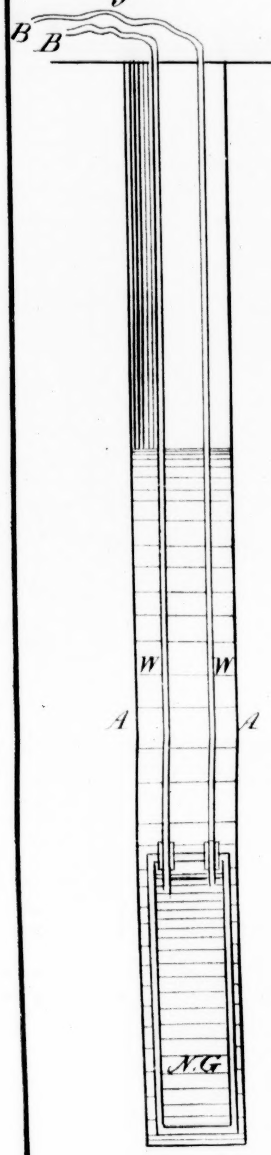


Fig. 2.

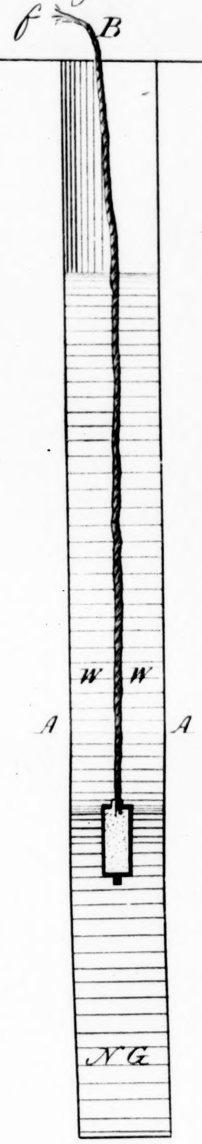


Fig 3.

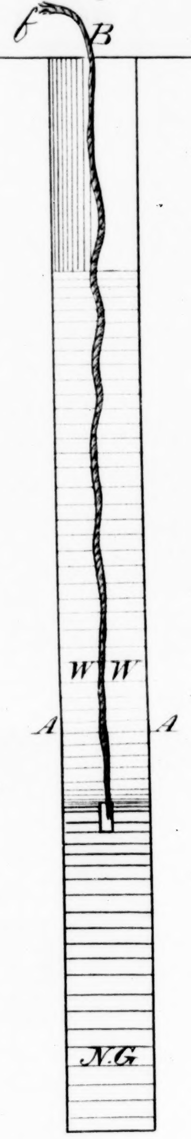
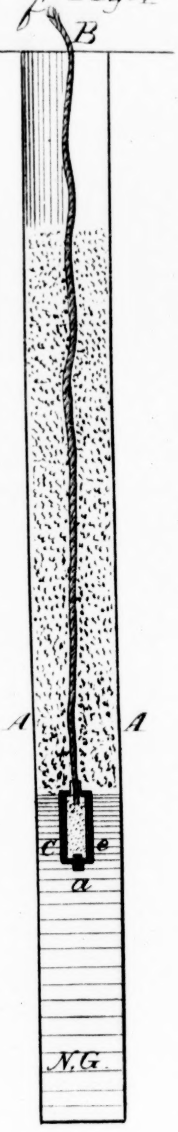


Fig. 4



No. 322
Giant Powder Co.
v.
Cal. Powder Works
} page 141

Alfred Nobel. Use of Nitro-Glycerine

Reissued
Apr 13 1869

Fig. 1.

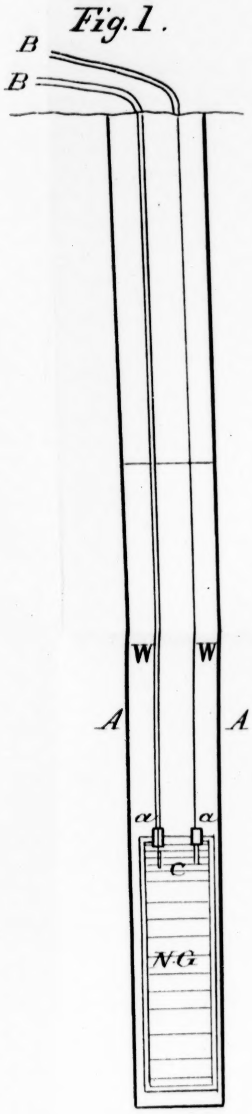


Fig. 2.

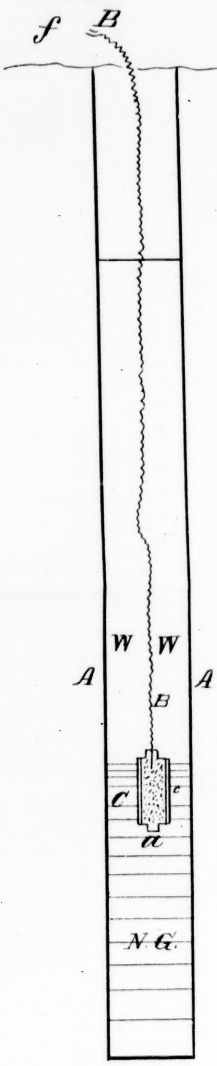


Fig. 3.

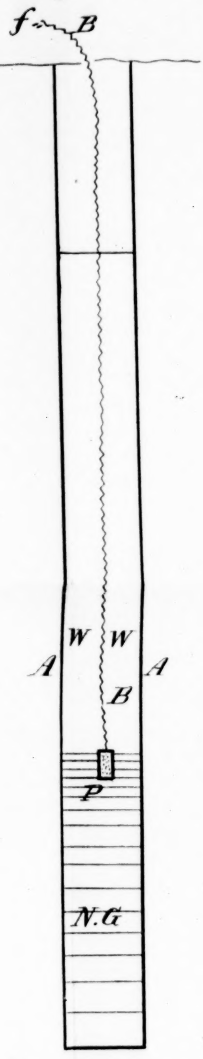
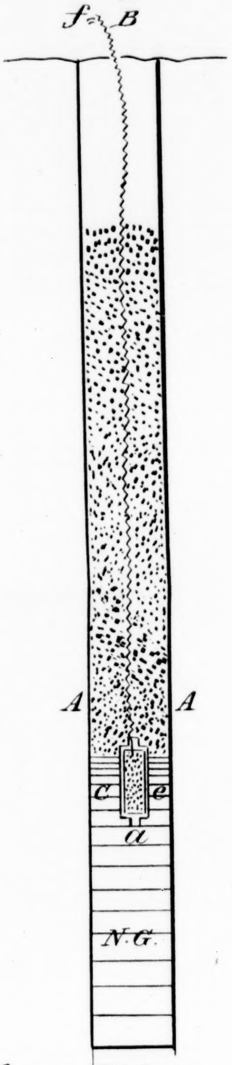


Fig. 4.



Inventor Alfred Nobel.

Assignee
The United States Blasting Oil Company

Witnesses
Chas. C. Wilson
J. E. M. Bowen

Tal. P. Shaffner Prest
James Deneau Secy

No. 322
Giant Powder Co
vs.
Cal Powder Works } page 144

Plate I.

Alfred Nobel.

Manufacture of Nitro-Glycerine.

No. 3379.

Reissued
April 13 1869.

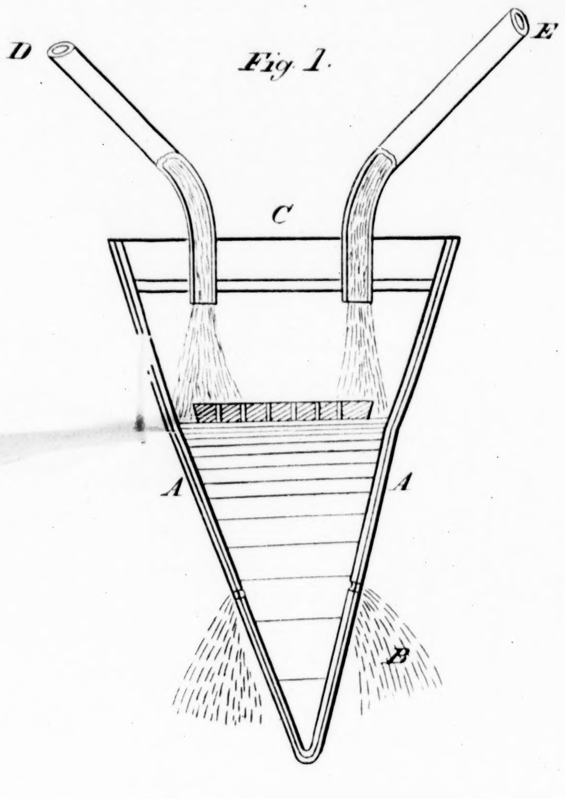


Fig. 1.

Inventor:
Alfred Nobel

Witnesses:
Chas. C. Wilson
J. E. M. Bowen

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Improvement in Devices for Exploding Nitro-Glycerine

№ 3380

Plate. II

No. 344
Giant Powder Co.
vs
Cal Powder Works } pag 159

Fig. 1.

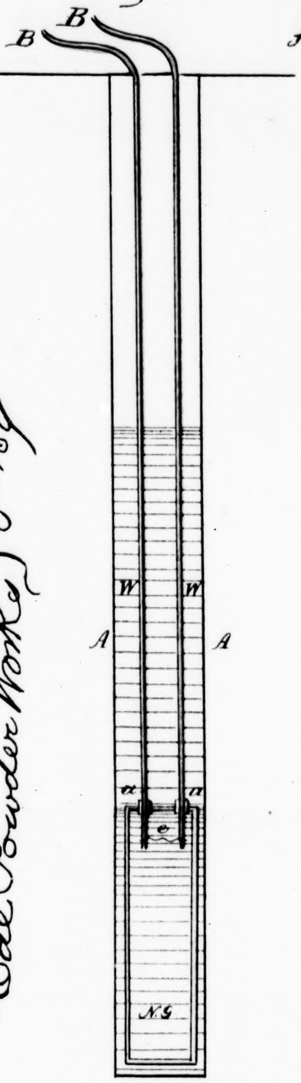


Fig. 2.

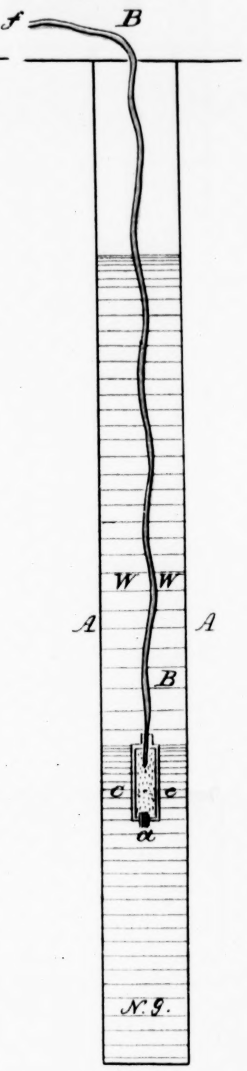


Fig. 3.

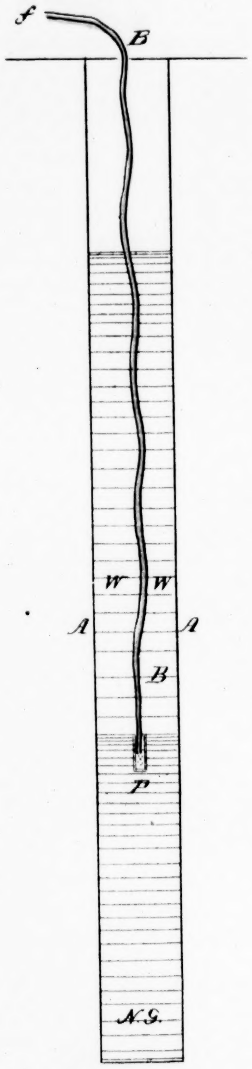
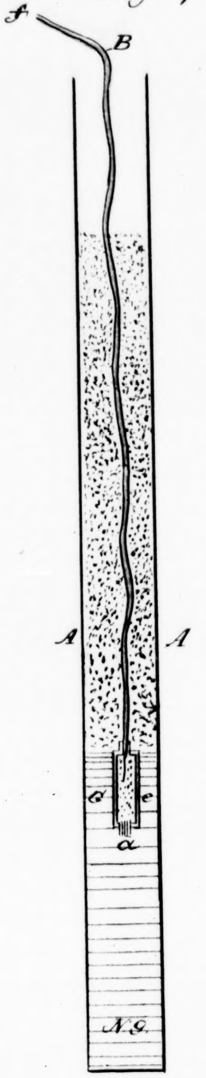


Fig. 4.



Inventor - Alfred Nobel

Assignee -
The United States Blasting Oil Comp'y

Witnesses
Chas. C. Wilson
J. E. M. Bowen

Tal. P. Shaffner Pres't
James Deveau Sec'y

Improvement in Devices for Exploding Nitro-Glycerine

Plate I.

No. 3380
Reissued April 13th 1869

Improvement in Devices for Exploding Nitro-Glycerine

No. 322.
Giant Powder Co
vs
Cal. Powder Works } page 160

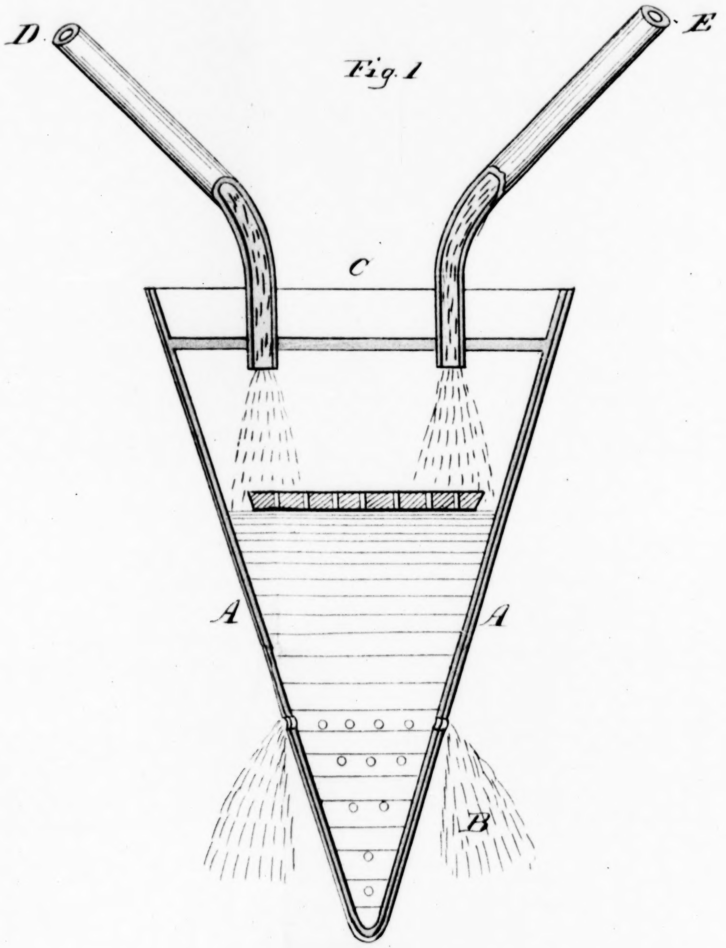


Fig. 1

Inventor - Alfred Nobel.

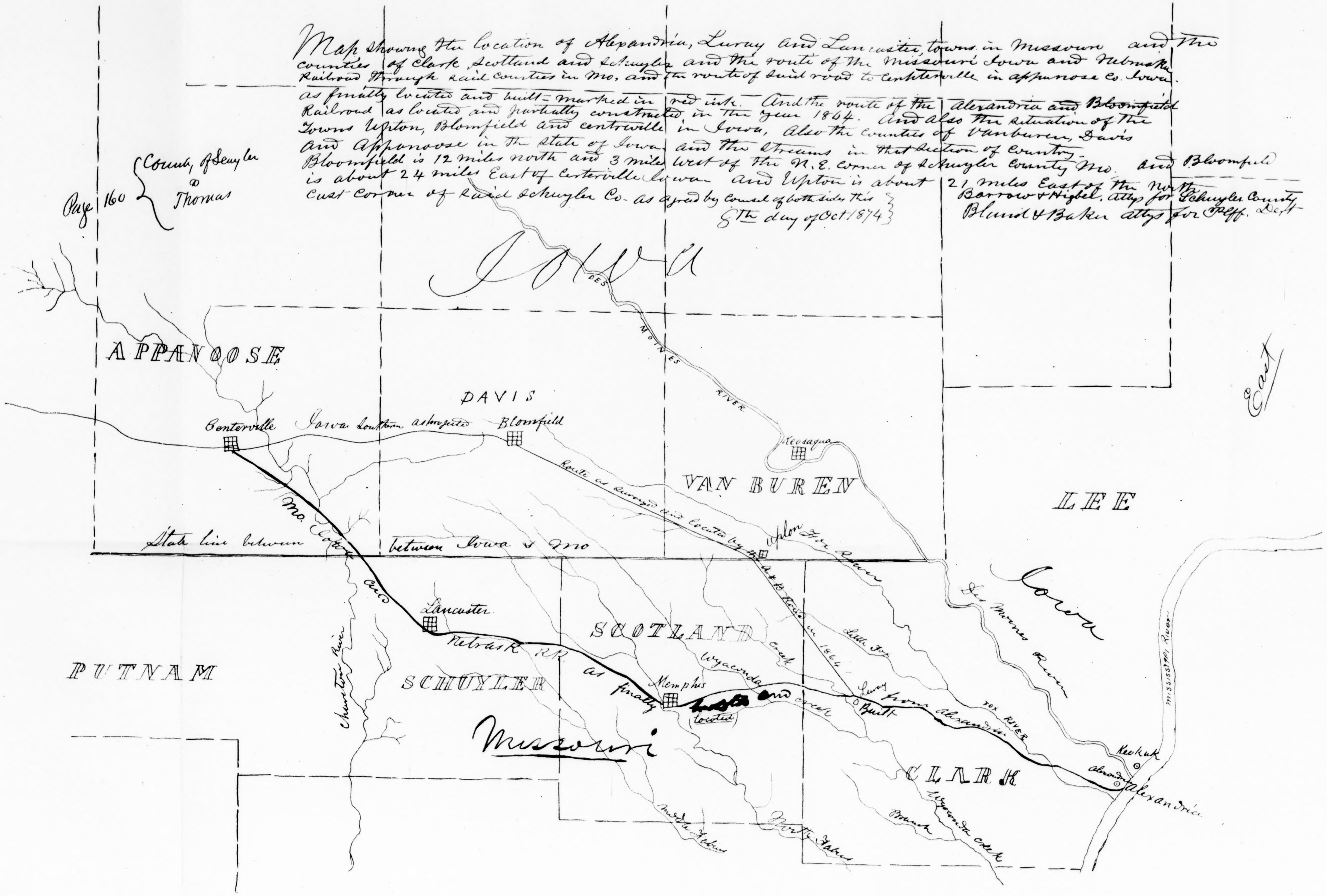
Assignee
The United States Blasting Oil Comp'y

Witnesses.
Chas. C. Wilson
J. E. M. Bowen

Tal. P. Shaffner Prest
James Deveau Secy.

160

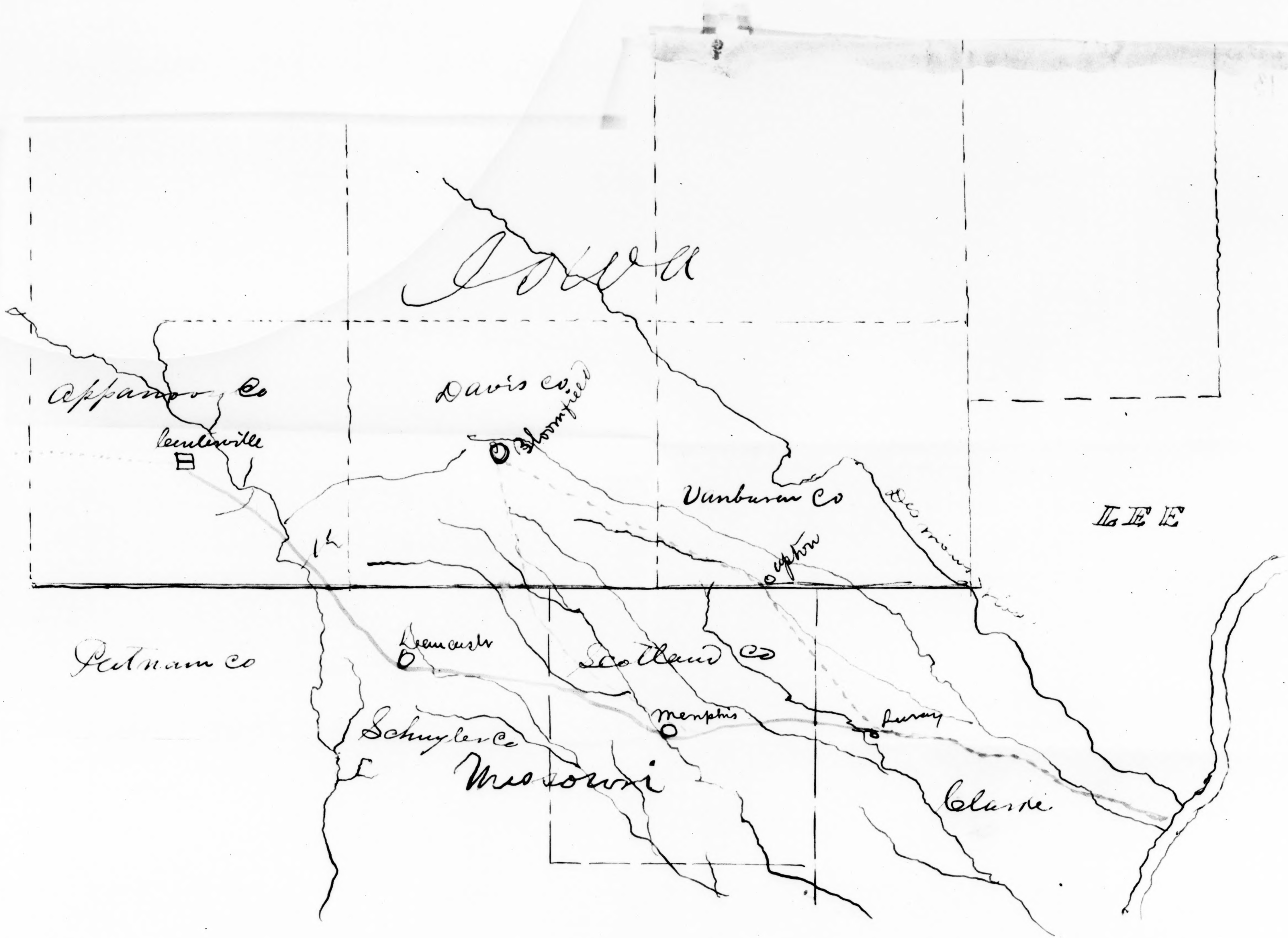
Page 160 { County of Schuyler vs Thomas



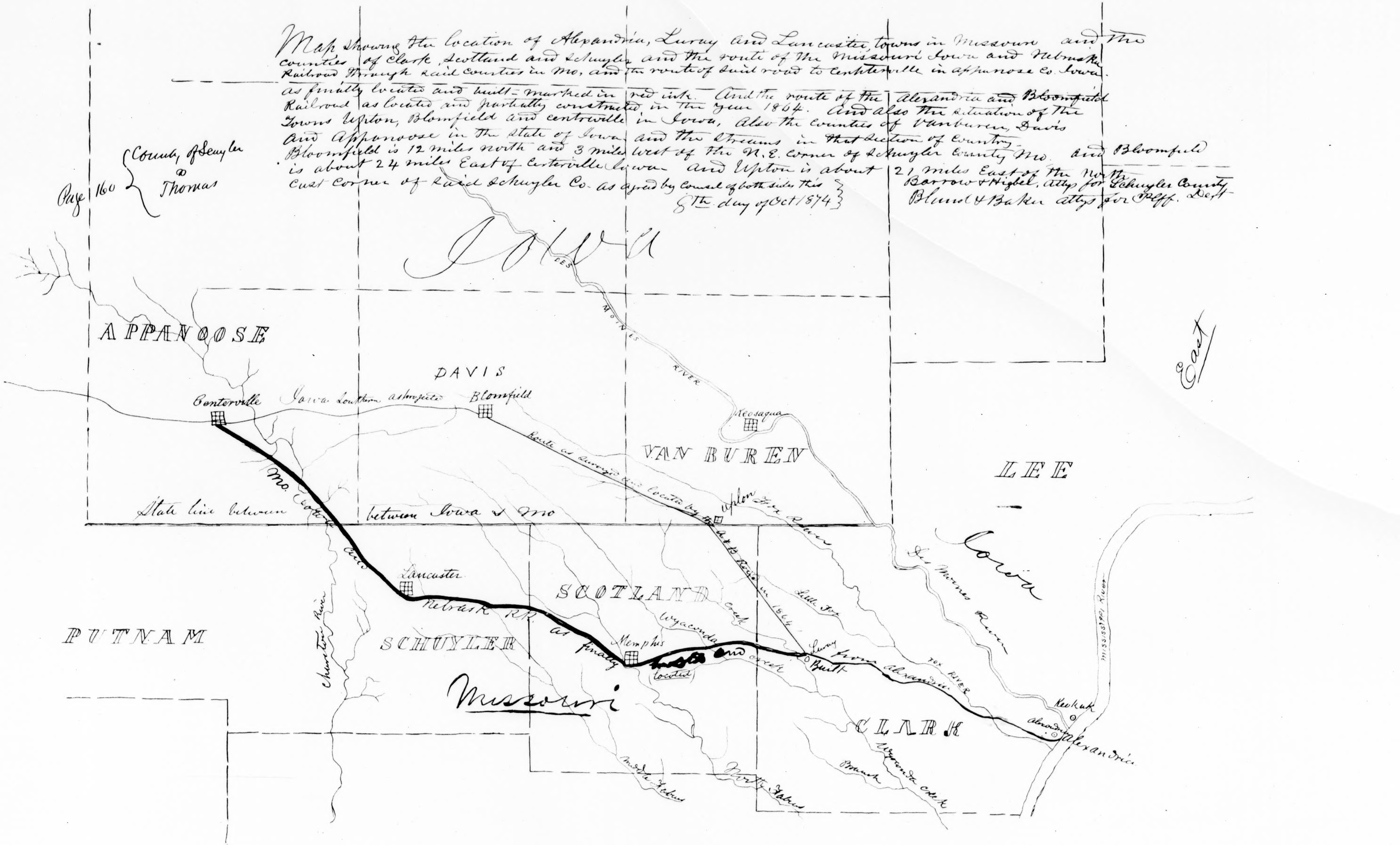
Map showing the location of Alexandria, Luray and Lancaster, towns in Missouri and the counties of Clark, Scotland and Schuyler and the route of the Missouri Iowa and Nebraska Railroad through said counties in Mo, and the route of said road to Centerville in Appanoose Co. Iowa as finally located and built — marked in red ink. And the route of the Alexandria and Bloomfield Railroad as located and partially constructed in the year 1864. And also the situation of the Towns Upton, Blomfield and Centreville in Iowa, Also the Counties of Vanburen, Davis and Apponoose in the State of Iowa and the Streams in that Section of Country. Bloomfield is 12 miles north and 3 miles West of the N. E. Corner of Schuyler County Mo. and Bloomfield is about 24 miles East of Centerville Iowa And Upton is about 21 miles East of the North East Corner of said Schuyler Co. As agreed by Counsel of both sides this 8th day of Oct 1874

Borrow & Higbel, attys for Schuyler County

Bland & Baker attys for ~~Plff.~~ Deft


Iowa
Appanoose Co
Centerville
Davis Co.
Bloomfield
Vanburen Co
Des moines Riv
Upton
LEE
Putnam co
Lancaster
Scotland Co
Memphis
Luray
Schuyler Co
Missouri
Clarke

Page 160 { County of Schuyler vs Thomas



Map showing the location of Alexandria, Luray and Lancaster, towns in Missouri and the counties of Clark, Scotland and Schuyler and the route of the Missouri Iowa and Nebraska Railroad through said counties in Mo, and the route of said road to Centerville in Appanoose Co. Iowa as finally located and built - marked in red ink. And the route of the Alexandria and Bloomfield Railroad as located and partially constructed in the year 1864. And also the situation of the Towns Upton, Blomfield and Centreville in Iowa, Also the Counties of Vanburen, Davis and Apponoose in the State of Iowa and the Streams in that section of Country. Bloomfield is 12 miles north and 3 miles west of the N. E. Corner of Schuyler County Mo. and Bloomfield is about 24 miles East of Centerville Iowa and Upton is about 21 miles East of the North East Corner of said Schuyler Co. As agreed by Counsel of both sides this 8th day of Oct 1874

Barrow & Higbel, attys for Schuyler County

Blund & Baker attys for Pltff. Deft

Transfers made by S. J. Walker and his alienees.

Block 13.

8 Record, p. 96.
S. J. Walker) War. Deed, Sept. 10, 1870
to
Philpot) Recorded Dec. 9, 1870.

Record, p. 19
Philpot) Trust Deed Sept. 10, 1870.
to
Rogers) Recorded Oct. 21, 1870

13 Record, p. 97.
S. J. Walker) War. Deed, July 1, 1872.
to
Coolbaugh
and Powers) Recorded Dec. 7, 1872.
The title was in

Block 14.

12 Record, p. 97.
S. J. Walker) War. Deed, July 1, 1872.
to
Coolbaugh
and Powers) Recorded Dec. 7, 1872.

14 Record, p. 97.
Coolbaugh
and Powers) Quit C. Deed, Feb. 25, 1873.
to
S. J. Walker) Recorded Apr. 3, 1873.

17 Record, p. 98.
Coolbaugh
and Powers) Quit C. Deed, Feb. 25, 1873.
to
S. J. Walker) Recorded Oct. 27, 1873.

15 Record, p. 95.
S. J. Walker) War. Deed, Feb. 25, 1873.
to
Ricker) Recorded Apr. 5, 1873.

Block 15.

5 Record, p. 97.
S. J. Walker) Trust Deed, Sept. 26, 1870.
to
Hoffman) Recorded Sept. 29, 1870.

11 Record, p. 96.
S. J. Walker) War. Deed, Mar. 8, 1872.
to
P. Brennock) Recorded Oct. 10, 1872.

24 Record, p. 98.
P. Brennock) War. Deed, May 23, 1874.
to
J. Brennock) Recorded June 26, 1874.

25 Record, p. 98.
J. Brennock) Trust Deed, June 5, 1874.
to
Rosenthal) Recorded June 29, 1874.

S. One Hundred ft. of Block 16.

6 Record, p. 96
S. J. Walker) War. Deed. Oct. 1, 1870
to
Pickett) Recorded Oct. 5, 1870

6 Record, p. 96
Picket) Trust Deed, Oct. 1, 1870
to
Wheeler) Recorded Oct. 5, 1870.

9 Record, p. 97
Pickett) Quit C. Deed. Sept. 20, 1871
to
S. J. Walker) Recorded Sept. 28, 1871.

12 Record, p. 95.
S. J. Walker) War. Deed, Nov. 25, 1872
to
Kinney) Recorded Dec. 2, 1872.

13 Record, p. 97
S. J. Walker) War. Deed, July 1, 1872
to
Coolbaugh
and Powers) Recorded Dec. 7, 1872
The title was in Kinney

16 Record, p. 96
Kinney) Trust Deed, Nov. 25, 1872.
to
Rogers) Recorded Oct. 23, 1873

22 Record, p. 98.
Coolbaugh
and Powers) Quit C. Deed. Feb. 25, 1874.
to
S. J. Walker) Recorded Apr. 15, 1874
The title was in Kinney

18 Record, p. 95 S. 100 ft. lot 16.
S. J. Walker
and
H. H. Walker
with
Orvis) Agreement to convey by War. Deed, Feb. 26, 1874
Recorded Feb. 26, 1874
The title was still in Kinney

21 Record, p. 95 S. 100 ft. lot 16.
H. H. Walker) War. Deed, Feb. 26, 1874.
to
Orvis) Recorded Apr. 9, 1874.
Inoperative when given, as the title was in Kinney

21 Record, p. 98. S. 100 ft. lot 16.
Orvis) Trust Deed, Feb. 26, 1874
to
Greenbaum) Recorded Apr. 9, 1874.
Inoperative at date of deed, title being in Kinney

19 Record, p. 96. Lot 16.
Kinney) Quit C. Deed, Mar. 6, 1874.
to
H. H. Walker) Recorded Mar. 16, 1874.
Vests title in Orvis

23 Record, p. 96. S. 100 ft. lot 16.
Rogers) Release, Apr. 8, 1874.
to
Kinney) Recorded Apr. 16, 1874.
Vests the interest released in Orvis

22 Record, p. 98. Lot 16.
S. J. Walker) Quit C. Deed, Apr. 11, 1874.
to
H. H. Walker) Recorded Apr. 15, 1874.
Inoperative, S. J. W. having no interest to convey

22 Record, p. 98. S. 100 ft. lot 16.
Orvis) Trust Deed, Apr. 15, 1874.
to
Somes) Recorded May 12, 1874.

N. Two Hundred and one ft. of Block 16.

6 Record, p. 96
S. J. Walker) War. Deed, Oct. 1, 1870.
to
Pickett) Recorded Oct. 5, 1870

6 Record, p. 96
Picket) Trust Deed, Oct. 1, 1870
to
Wheeler) Recorded Oct. 5, 1870.

9 Record, p. 97
Pickett) Quit C. Deed, Sept. 20, 1871
to
S. J. Walker) Recorded Sept. 28, 1871

12. Record, p. 95.
S. J. Walker) War. Deed, Nov. 25, 1872
to
Kinney) Recorded Dec. 2, 1872

13 Record, p. 97.
S. J. Walker) War. Deed, July 1, 1872
to
Coolbaugh
and Powers) Recorded Dec. 7, 1872
The title was in Kinney

16 Record, p. 96
Kinney) Trust Deed, Nov. 25, 1872.
to
Rogers) Recorded Oct. 23, 1873

22 Record, p. 98
Coolbaugh
and Powers) Quit C. Deed, Feb. 25, 1874.
to
S. J. Walker) Recorded Apr. 15, 1874
The title was in Kinney

26 Record, p. 95 N. 200 ft. of lot 16
S. J. Walker) Receipt, Feb. 27, 1874
to
Flanagan) Recorded Apr. 4, 1874.
At date of receipt the title was in Kinney

22 Record, p. 95 N. 201 ft. of lot 16
H. H. Walker) War. Deed, Feb. 27, 1874.
to
Flanagan) Recorded Apr. 15, 1874
Inoperative at date of deed, the title being in Kinney

22 Record, p. 99. N. 201 ft. lot 16.
Flanagan) Trust Deed, Feb. 27, 1874
to
Rogers) Recorded Apr. 15, 1874.
At date of deed title was in Kinney

19 Record, p. 96. Lot 16.
Kinney) Quit C. Deed, Mar. 6, 1874
to
H. H. Walker) Recorded Mar. 16, 1874
Vests title in Flanagan

22 Record, p. 98. Lot 16.
S. J. Walker) Quit C. Deed, Apr. 11, 1874
to
H. H. Walker) Recorded Apr. 15, 1874.
Inoperative, S. J. W. having no interest to convey

Block 17.

6 Record, p. 96
S. J. Walker) War. Deed, Oct. 1, 1870
to
Pickett) Recorded Oct. 5, 1870

6 Record, p. 96
Picket) Trust Deed, Oct. 1, 1870
to
Wheeler) Recorded Oct. 5, 1870

9 Record, p. 97.
Pickett) Quit C. Deed, Sept. 20, 1871
to
S. J. Walker) Recorded Sept. 28, 1871

10 Record, p. 96.
S. J. Walker) War. Deed, Oct. 2, 1871
to
Ralston) Recorded Sept. 4, 1872

10 Record, p. 99.
Ralston) Trust Deed, Oct. 2, 1871
to
Rogers) Recorded Sept. 4, 1872

10 Record, p. 99
Ralston) Quit C. Deed Oct. 3, 1871.
to
N. W. Fer. Co) Recorded Sept. 4, 1872

Block 18.

6 Record, p. 96.
S. J. Walker) War. Deed, Oct. 1, 1870
to
Pickett) Recorded Oct. 5, 1870

6 Record, p. 96
Picket) Trust Deed, Oct. 1, 1870.
to
Wheeler) Recorded Oct. 5, 1870.

9 Record, p. 97
Pickett) Quit C. Deed, Sept. 20, 1871.
to
S. J. Walker) Recorded Sept. 28, 1871

13 Record, p. 97.
S. J. Walker) War. Deed, July 1, 1872
to
Coolbaugh
and Powers) Recorded Dec. 7, 1872

Record, pp. 81, 82.
Coolbaugh &
Powers and
S. J. Walker
with
Tillinghast } Contract of Sale of S. ½ of block 18, dated Sept. 3, 1874.

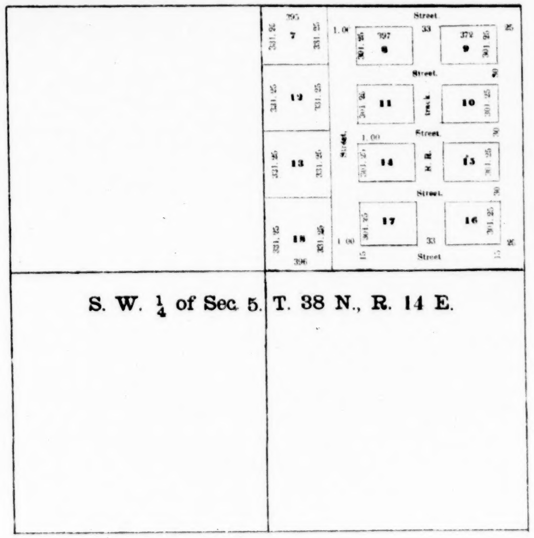
Record, p. 94.
Powell
to
H. H. Walker } Deed, April 1, 1869.
Recorded May 25, 1869.
Con. undivided ½ of S. W. ¼, Sec. 5, T. 38 N., R. 14 E.

Record, p. 94.
H. H. Walker
to
Powell } Mort. April 8, 1869.
Rec. May 25, 1869.
Con. N. E. ¼ of S. W. ¼ of Sec. 5, T. 38, N., R., 14 E.

Record, p. 94.
Powell
to
H. H. Walker } Release, Sept. 12, 1870.
Rec. Sept. 19, 1870.
N. ½ of N. E. ¼ of S. W. ¼ Sec. 5, T. 38, N., R. 14 E.

Record, p. 94.
H. H. Walker
to
S. J. Walker } Quit C. Deed April 12, 1870.
Rec. Sept. 19, 1870.
N. E. ¼ of S. W. ¼, Sec. 5, T. 38, N., R. 14 E.

Packer's subdivision, by S. J. Walker, of the N. E. ¼ of S. W. ¼, Sec. 5, T. 38 N. R. 14, E. Recorded April 30, 1870.



Page 1

Present the Honorable Henry W. Blodgett Judge

Nathan Powell
complainant
vs

Henry H Walker. Samuel J Walker.
Brian Philpot. Adeline M. Philpot. John G Rogers.
Bacon Wheeler. Francis A. Hoffman. William F.
Coolbaugh. Addie R. Coolbaugh. Herman G. Powers.
Sarah E. Powers. Sherman A Ricker. Wirt
Dexter. John Bremock. Patrick Bremock.
Julius Rosenthal. Emerson G Oviatt. Elias
Greenebaum. Mary E. Oviatt. John Somes,
William P. Frisbey William Flannigan,
Abraham Wibzinski. S. J. Marcus,
John Miller Otway Watson. Charles A
Belden. George Birkhoff. Mary Bond.
Abner Taylor. Cyrus H. McCormick.
The North Western Fertilizing Company.
The Third National Bank of St. Louis.
James L. Minchell. John P. Squire.
Gerhard Foreman. Levi Alt. The
International Bank. Charles S Symonds
and Daniel Pratt as Assignees in Bankruptcy of
the Peoples Safe-deposit and Savings Institution
of the State of New York.

defendants

Page 2

This cause having this day been brought on to be heard upon the bill of complaint filed herein and the answers thereto respectively of the defendants Henry H. Walker Samuel J. Walker. John G Rogers. Sherman A Ricker. William F Coolbaugh. Addie R Coolbaugh. Herman G Powers Sarah E. Powers. John Bremock. Patrick Bremock. Julius Rosenthal. Emerson G Oviatt. ~~Sarah~~ Mary E Oviatt. John P. Squire John Somes. William P. Frisbey. Abner Taylor. The North Western Fertilizing Company. Elias Greenebaum. Gerhard Foreman. Levi Alt. The International Bank. Francis A Hoffman, and Charles S Symonds and Daniel Pratt as assignees in Bankruptcy of the Peoples Safe Deposit & Savings Institution of the State of New York. and upon the replication of the complainant to such answers respectively. And upon said bill of complaint taken as confessed by Brian Philpot. Adeline M. Philpot Bacon Wheeler. Wirt Dexter. William Flannigan Flannigan Abraham Wibzinski, S. J. Marcus. John Miller. Otway Watson ~~Charles A. Belden George Birkhoff~~. Mary Bond. Cyrus H. McCormick. The Third National Bank of St. Louis, James L Minchell

the others of said defendants. And also upon the cross bill of complaint filed in said cause by Sherman A Ricker one of the defendants to said cause taken as confessed by all the defendants therein named, and also upon the cross bill of complaint filed in said cause by Emerson G Oviatt another of said defendants.

~~[illegible] report of Henry W. Bishop Esq. Master in Chancery of this Court, which report bears date the twelfth day of March A.D. 1875, and was made in pursuance of an order of this court heretofore entered in this cause referring it to the said master to take the proofs in said cause, both upon said bill and the cross bill of said Sherman A Ricker and to compute the amount due to the complainant upon the~~ and

Page 3

~~United States of America~~ } ss.
~~Northern District of Illinois~~
~~In the Circuit Court of the United States~~
~~For the Northern District of Illinois.~~

~~Nathan Powell~~
complainant
~~vs.~~
~~Henry H. Walker,~~
~~Samuel J Walker,~~
~~Sherman A Ricker,~~
Et alios
defendants

In Chancery.

~~May Term A.D. 1875~~

~~Present the Honorable Henry W. Blodgett, Judge.~~

~~This cause having this day been~~ brought ~~on to be heard upon the bill of complaint filed herein, the answers thereto, the Cross Bill of Sherman A Ricker, the replications filed herein~~ and upon the Report of the Master in Chancery, with the testimony of the several witnesses and other proofs therewith submitted, heretofore filed herein, And the Court having also considered the stipulation of Samuel J. Walker, Henry H. Walker, Louisa M. Tillinghast and William Flannagan also filed herein, and having heard the allegations and proofs, and pleas of their

Page 4.

several Counsel, and being now fully advised in the premises, finds that the South one half (S. ½) of the North East One Quarter (N.E. ¼) of the South West One Quarter (S.W. ¼) of Section Five (5) Township Thirty Eight (38) North of Range Fourteen (14) East of the Third (3rd) Principal Meridian, in Cook County in the State of Illinois, is the property covered by the mortgage to the said Nathan Powell, complainant herein, and liable for the payment of ~~to respond~~ the amount now due on the note secured by said mortgage, towit the sum of Fourteen thousand Eight hundred and fifty three dollars and thirty three cents

The Court also finds that the material allegations of the Cross-Bill filed herein by Sherman A Ricker, one of the defendants, are sustained by the proofs, and that there is in the hands of Louisa M. Tillinghast and in the hands of Robert Thorey, Attorney of William Flannagan, certain moneys, notes or securities, arising from sales or contracts of sale of portions of the above described premises, so as aforesaid conveyed in mortgage to the said Nathan Powell, which ought in equity to be brought into Court here, to be held under the direction of the Court and first applied to the liquidation of the amount due on said mortgage of said Com-

Page 6

Third: Block Fourteen (14) in said Subdivision.

Fifth ~~Fourth~~: Blocks Thirteen (13) and Eighteen (18) in said subdivision.

Sixth ~~Fifth~~: Block Fifteen (15) in said Subdivision.

Seventh ~~Sixth~~: Block Seventeen (17) in said Subdivision.

And this Court being fully advised in the premises, doth find and adjudge that all the material allegations in the said Bill of Complaint, and in said Cross-bill of Sherman A Ricker, contained, have been fully proved, and that there is due to the complainant said Nathan Powell on the premises from the said defendants, Henry H Walker and Samuel J. Walker the sum of fourteen thousand eight hundred and fifty three 33/100 dollars, with interest thereon from the twelfth day of March A.D. 1875, the date of said Master's report.

It is therefore, upon motion of counsel for the complainant, ordered, adjudged and decreed, and this Court by virtue of the power and authority in it vested, doth order, adjudge and decree, that the said Louisa M. Tillinghast, pay or cause to be paid into Court, within ten days from the entry of this decree, the sum of twelve thousand six hundred and sixty and [illegible]/100 dollars

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being the amount due from said Louisa M Tillinghast as purchase money of the South half of Block Eighteen (18) in said Packer's Subdivision, according to the Contract of sale heretofore executed between said Tillinghast, Samuel J. Walker, William F. Coolbaugh and Herman G. Powers; and it is further ordered adjudged and decreed by the Court, that the said William Flannagan, pay or cause to be paid into court within ten days from the day of the entry of this decree, the sum Eleven thousand eight hundred and forty three 33/100 dollars, being the amount agreed to be paid by said Flannagan, as part purchase money for the North two hundred and one (201) feet of Block sixteen (16) in said Packer's Subdivision, with accrued interest thereon; the said sums and each of them so to be paid into court, to be applied, under the direction of the Court, as the rights of the parties may appear and as equity shall seem meet.

It is further ordered, adjudged and decreed by the Court, that if the said Louisa M. Tillinghast and the said William Flannagan, shall fail to pay or cause to be paid into court, within the time aforesaid, the said several sums of

Page 8

money, so as aforesaid ordered to be paid into Court, or if from any cause, a sum of money sufficient to liquidate the amount due said Complainant Powell on the mortgage aforesaid, shall not be realized out of said Tillinghast and Flannagan moneys, so as aforesaid ordered to be paid into Court; then it is further ordered, adjudged and decreed by the Court that the said mortgaged premises, or so much of same as may be necessary for the payment of the amount due on said mortgage with costs of this suit, be sold ~~separately, in the order named in the Report of the Master in Chancery filed herein~~, by public auction, by or under the direction of the Master in Chancery of this Court, and that said Master make such sale in accordance with the course and practice of this Court, and that at such sale the complainant or any of the parties to this suit may become the purchaser.

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It is further ordered, that said Master make report to this Court of such sale and of his acts and doings in the premises for approval and confirmation, and for further direction herein; and that he retain from the proceeds of said sale the amount of his fees, disbursements and commissions thereon, and bring the residue of such proceeds, if any, into Court, to abide the further order of the Court, and that he take the receipt of the clerk of this Court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit and expenses of sale as aforesaid, that the said Master specify the amount of such deficiency in his said report of sale.

And all further matters [illegible] to the further order and direction of this Court, in this cause.

The above is satisfactory to me

...ourable Henry W. Blodgett Judge

...plainant

...amuel J. Walker
...e M. Philpot. John G. Rogers.
... A. Hoffman. William F.
...ollbaugh. Herman G. Powers.
...rman A. Ricker. Wirt
...rnock. Patrick Brennock.
... Emerson G. Orvis. Elias
... E. Orvis. John Sones,
... William Flannigan,
...ki. S. J. Marcus,
...way Waters. Charles A
...irkhoff. Mary Bond.
... H. McCormick.
... Fertilizing Company.
... Bank of St Louis.
...hall. John F. Squire.
... Levi Abt. The
...n. Charles S. Symonds.
... Assignees in Bankruptcy of
...t and Savings Institution
... York.

Defendants

Page 2.

This cause having this day been brought on to be heard upon the bill of complaint filed herein and the answers thereto respectively of the defendants Henry H. Walker Samuel J. Walker. John G Rogers. Sherman A Ricker. William F Collbaugh. Addie R Collbaugh. Herman G Powers Sarah E. Powers. John Brennock. Patrick Brennock. Julius Rosenthal. Emerson G Orvis. ~~Sarah~~ Mary E Orvis. John F. Squire John Sones. William F. Tinley. Abner Taylor. The North Western Fertilizing Company. Elias Greenebaum. Gerhard Foreman. Levi Abt. The International Bank Francis A Hoffman and Charles A Symonds and Daniel Pratt as assignees in Bankruptcy of the Peoples Life Deposit & Savings Institution of the State of New York. and upon the replication of the complainant to such answers respectively. And upon said bill of complaint taken as confessed by Brian Philpot. Adeline M. Philpot Bream Wheeler. Wirt Dexter. William Flannigan Flannigan Abraham Wilzinski. S. J. Marcus. John Miller. Otway Waters ~~Charles A. Boldin~~ George Birkhoff. Mary Bond. Cyrus H. McCormick. The Third National Bank of St Louis. James D Minick

the other of said defendants. And also upon the cross bill of complaint filed in said cause by Sherman A Ricker one of the defendants to said cause taken as confessed by all the defendants therein named, and also upon the cross bill of complaint filed in said cause by Emerson G. Orvis another of said defendants.

~~Court~~ [illegible] ~~report of Henry W. Bishop Esq Master in Chancery of this Court, which report bears date the seventeenth day of March A.D. 1875, and was made in pursuance of an order of this court heretofore entered in this cause referring it to the said master to take the proofs in said cause both upon said bill and the cross bill of said Sherman A Ricker and to compute the amount due to the complainant upon the note and~~

Page 3.

~~United States of America~~ } ss.
~~Northern District of Illinois~~
~~In the Circuit Court of the United States~~
~~For the Northern District of Illinois.~~

~~Nathan Powell~~
complainant
~~vs.~~
~~Henry H. Walker,~~
~~Samuel J. Walker,~~
~~Sherman A Ricker,~~
et alios
defendants

In Chancery.

~~May Term A.D. 1875~~

~~Present the Honorable Henry W. Blodgett, Judge.~~

~~This cause having this day been~~ brought ~~and heard upon the bill of complaint filed herein, the answers thereto, the Cross bill of Sherman A Ricker, the replications thereto herein~~ and upon the Report of the Master in Chancery, with the testimony of the several witnesses and other proofs therewith submitted, heretofore filed herein. And the Court having also considered the Stipulation of Samuel J. Walker, Henry H. Walker, Louisa M. Tillinghast and William Flannagan also filed herein, and having heard the allegations and proofs, and pleas of the

[illegible]

Page 4.

several Counsel, and being now fully advised in the premises, finds that the South one half (S.½) of the North East one Quarter (N.E.¼) of the South West One Quarter (S.W.¼) of Section Five (5) Township Thirty Eight (38) North of Range Fourteen (14) East of the Third (3rd) Principal Meridian, in Cook County in the State of Illinois, is the property covered by the mortgage to the said Nathan Powell, complainant herein, and liable for the payment of ~~to respond to~~ the amount now due on the note secured by said mortgage, towit the sum of Fourteen thousand eight hundred and fifty three dollars and thirty three cents

The Court also finds that the material allegations of the Cross-Bill filed herein by Sherman A Ricker, one of the defendants, are sustained by the proofs, and that there is in the hands of Louisa M. Tillinghast and in the hands of Robert Thrasy, Attorney of William Flannagan, certain moneys, notes or securities, arising from sales or contracts of sale of portions of the above described premises, so as aforesaid conveyed in mortgage to the said Nathan Powell, which ought in equity to be brought into Court here, to be sold under the direction of the Court and first applied to the liquidation of the amount due on said mortgage of said Com-

Page 5

plainant, as set out in said Cross-bill, and under and according to the stipulation aforesaid filed herein.

The Court also finds that the premises covered by said mortgage, as aforesaid, have been sub-divided since the date of said mortgage, and that the property covered by said mortgage is now known and described as Blocks Thirteen (13) Fourteen (14) Fifteen (15) Sixteen (16) Seventeen (17) and Eighteen (18) of Packer's Subdivision of the North East Quarter (N.E.¼) of the South West Quarter (S.W.¼) of Section Five (5) Township Thirty Eight (38) North of Range Fourteen (14) East of the Third (3rd) Principal Meridian. That since the giving of said Mortgage by Henry H. Walker to said Complainant, conveyances of different Blocks and parts of Blocks in said Subdivision have been made and that, following the inverse order of the alienation thereof the said Blocks and parts of Blocks are liable to be, and should be, sold in the following order, viz:

First: The North two hundred and one (201) feet of Block Sixteen in said Subdivision.*

Second: The South One hundred (100) feet of said Block Sixteen.

* excepting therefrom all the estate, right, title, interest, claim, property and demand of the said John G. Rogers and of the said Elias Greenebaum and Gerhard Foreman therein under and by virtue of the certain deed of trust executed by John G. Rogers to said John G. Rogers bearing date the twenty fifth day of November A.D. 1872 and filed for record in the Recorder's office of Cook County Illinois on the twenty third day of October A.D. 1873 and recorded therein in Book 266 on page 453 and subject thereto.

...k Fourteen (14) in said

...ks Thirteen (13) and Eight...
...d Subdivision.
...k Fifteen (15) in said

...k Seventeen (17) in said

...e Court being fully advised
... doth find and adjudge that
...allegations in the said Bill of
...in said Cross-bill of Sherman
...aid, have been fully proved,
...is due to said Nathan Powell the complainant in
...he said defendants Henry H.
...uel J. Walker the sum of four-
...ht hundred and fifty three 33/100
...rest thereon from the 17th
...D. 1875, the date of said Master's

...upon motion of counsel for
...dered, adjudged and decreed,
... virtue of the power and au-
... doth order, adjudge and decree,
...uisa M. Tillinghast, pay or cause
...ourt, within ten days from
...ecree, the sum of twelve thou-
...and sixty and ~~[illegible]~~ 7/100 dollars

Page 7

being the amount due from said Louisa M. Tillinghast as purchase money of the South half of Block Eighteen (18) in said Packer's Subdivision, according to the Contract of Sale heretofore executed between said Tillinghast, Samuel J. Walker, William F. Collbaugh and Herman G. Powers; and it is further ordered adjudged and decreed by the Court, that the said William Flannagan, pay or cause to be paid into court within ten days from the day of the entry of this decree, the sum of Eleven thousand eight hundred and forty three ~~[illegible]~~ 33/100 dollars, being the amount agreed to be paid by said Flannagan, as part purchase money for the North two hundred and one (201) feet of Block Sixteen (16) in said Packer's Subdivision, with accrued interest thereon; the said sums and each of them so to be paid into court, to be applied, under the direction of the Court, as the rights of the parties may appear and as to equity shall seem meet.

It is further ordered, adjudged and decreed by the Court, that if the said Louisa M. Tillinghast and the said William Flannagan, shall fail to pay or cause to be paid into court, within the time aforesaid, the said several sums of

Page 8

money, so as aforesaid ordered to be paid into Court, or if from any cause, a sum of money sufficient to liquidate the amount due said Complainant Powell on the mortgage aforesaid, shall not be realized out of said Tillinghast and Flannagan moneys, so as aforesaid ordered to be paid into Court; then it is further ordered, adjudged and decreed by the Court that, unless the said Henry H. Walker or some of the other defendants in this case, pay or cause to be paid to the Complainant within ten days from the entry of this decree the said sum of [illegible] due the complainant with interest thereon [illegible] from the date of said Master's report, the said mortgaged premises, or so much of same as may be necessary for the payment of the amount due on said mortgage with costs of this suit, be sold ~~in parcels~~ ~~[illegible]~~ ~~in the Report of the Master in Chancery~~ ~~[illegible]~~, by public auction, by ~~or~~ under the direction of the Master in Chancery of this Court, and that said Master make such sale in accordance with the course and practice of this Court, and that at such sale the complainant or any of the parties to this suit may become the purchaser.

It is further ordered, adjudged and decreed that said Master [illegible] said premises as [illegible] ~~[illegible]~~ herein as above provided and if when [illegible] an amount sufficient to pay what is due [illegible] complainant cannot be realized, that then the said Master [illegible] sell said premises [illegible] by the ~~[illegible]~~ herein first above named, and without reference to any subdivision thereof whatever, and without any exception or reservation thereof whatever.

It is further ordered that the Cross-bill of Complaint filed in this cause by said Emerson G. Orvis be dismissed for want of equity.

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It is further ordered, that said Master make report to this Court of such sale and of his acts and doings thereunder for approval and confirmation, and for further direction herein; and that he retain from the proceeds of said sale the amount of his fees, disbursements and commissions thereon, and bring the residue of such proceeds, if any, into Court, to abide the further order of the Court, and that he take the receipt of the clerk of this Court therefor, and file the same with said report; and if the moneys arising from such sale shall be insufficient to pay the amount so found and adjudged to be due to the complainant, with the interest thereon, and the costs of suit and expenses of sale as aforesaid, that the said Master specify the amount of such deficiency in his said report of sale.

And it is further ordered, that the clerk of this Court hold such moneys ~~so to be paid into Court by said Master~~ subject to the further order and direction of this Court, in this cause.

The above is satisfactory to me
A. W. [illegible]

Term No. 491

United States Circuit Court.
NORTHERN DISTRICT OF ILLINOIS.

Nathan Powell

vs.

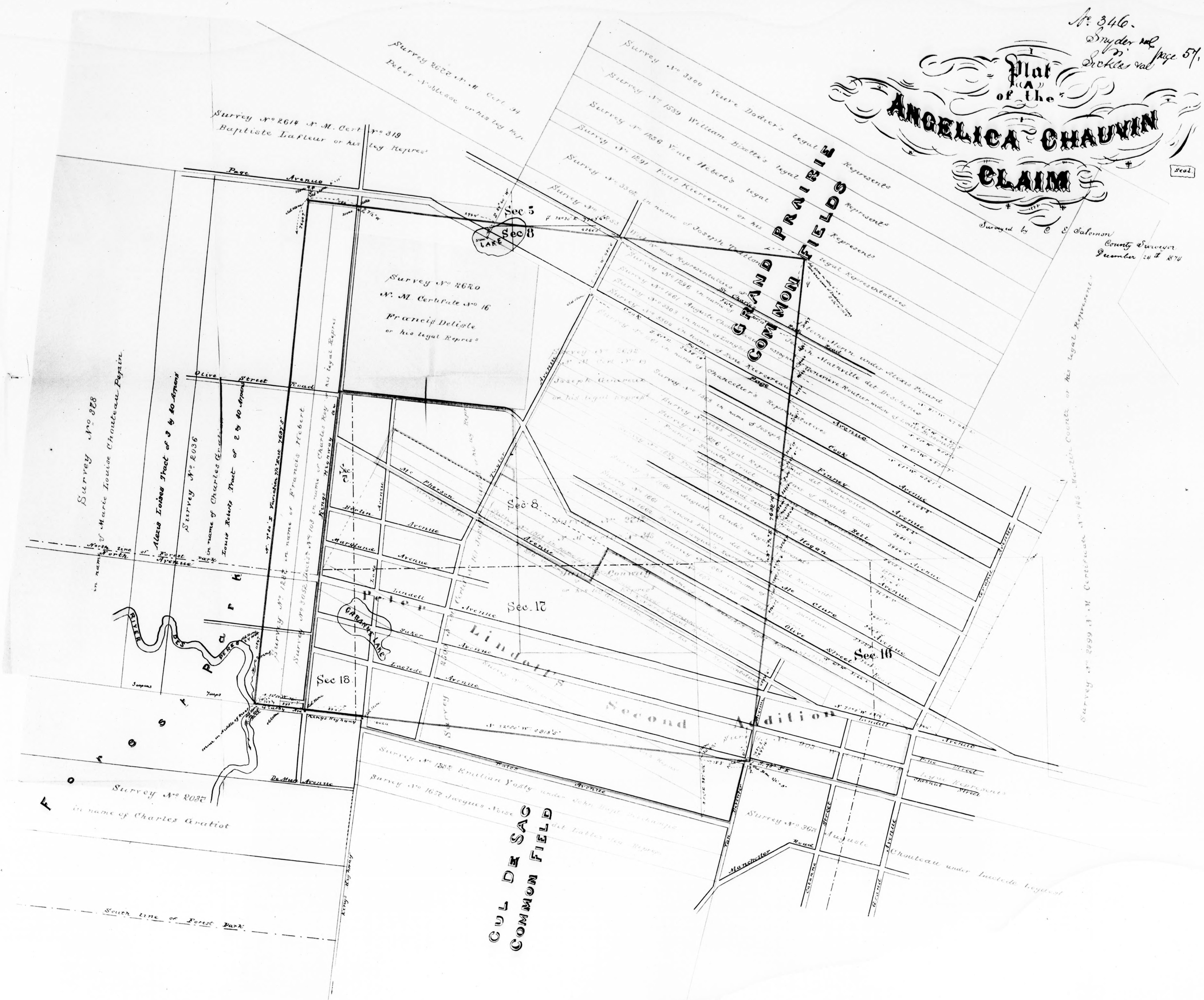
Henry H Walker et al

Draft of Decree of Sale.

June 5 1875

Enter
H. W. B.
~~Solicitor.~~

No. 346.
Snyder vol
21
Sickles vol page 57.



Plat of the Angelica Chauvin Claim

Seal.

Surveyed by C. E. Salomon
County Surveyor
December 24th 1874

GRAND PRAIRIE COMMON FIELDS
CUL DE SAC COMMON FIELD
Forest Park
Peter Lindell's Second Addition
Survey No. 2614 N. M. Cert. No. 319 Baptiste Lafleur or his leg Repres.
Survey 2622 N. M. Cert. 94 Peter Noblesse or his leg Repe
Survey No. 3300 Veuve Dodier's legal Represents
Survey No. 1589 William Bizette's legal Represents
Survey No. 1856 Veuve Hebert's legal Represents
Survey No. 1291 Paul Kiercereau or his legal Represents
Survey No. 3308 in name of Joseph Tabeau ... legal Representatives
Survey No. 2620 N. M. Certificate No. 16 Francis Delisle or his legal Repres.
Survey No. 2692 N. M. Cert. No. 19 Joseph Generaux or his legal Repres.
Survey No. 1563 in name of Joseph ...
Survey No. 3285 Francis Dunegand dit Beaurosier
Survey No. 1226 legal Representatives of Auguste Condé
Survey No. 1659 Francois Marechal
Survey No. 1660 Auguste Condé's legal Represents
Survey No. 1661 Francois Faustin dit Parent
Survey No. 1662 Benite Pasquier's Represents
Survey No. 2512 N. M. Certif. No. 345 James Conway or his legal Repres.
Antoine Morin under Alexis Picard
Joseph Mainville dit Deschenes
Genevieve Routier widow of Louis Bissonette
Chancelier's Representatives
Survey No. 328 in name of Marie Louise Chouteau Pepin
Alexis Loises Tract of 3 by 40 Arpens
Survey No. 2036 in name of Charles Gratiot
Louis Roberts Tract of 2 by 40 Arpens
N. 7°30' E. Variation 7½° East 7697.5'
Survey No. 1282 in name of Francis Hebert
Survey No. 3052 Decis. No. 103 in name of Charles Roy or his legal Repres.
Survey No. 2037 in name of Charles Gratiot
Survey No. 1388 Emilian Yosty under John Bapt. Deschamps
Survey No. 1657 Jacques Noise dit Labbé
Survey No. 903
Survey No. 368 Auguste Chouteau under Laclede Liguest
Survey No. 2499 N. M. Certificate No. 145 Martin Coontz or his legal Represent.
North line of Forest Park
North Avenue
South line of Forest Park
River Des Peres
Cabanne Lake
Lake
Sec 5
Sec 8
Sec 7
Sec 17
Sec 18
Sec 16
Page Avenue
Olive Street Road
Kings Highway
St. Charles Road
Cook Avenue
Finney Avenue
Bell Avenue
Hogan Avenue
McClure Avenue
Olive Street
McPherson Avenue
Berlin Avenue
Maryland Avenue
Lindell Avenue
Baker Avenue
Laclede Avenue
Lake Avenue
Taylor Avenue
Grand Avenue
Pine Street
Chesnut Street
Bates Avenue
DeMun Avenue
Manchester Road
Market Street
Grasby Ave
N. 82°50' W. 6918.5'
N. 7½° E. 7692.10'
S. 32°30' E. 7703.4'
N. 75°5' W. 2459'
S. 75° 3' E.